Exhibit 134

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

fuboTV Inc. and fuboTV Media Inc., *Plaintiffs*, v. The Walt Disney Company, ESPN, Inc., ESPN Enterprises, Inc., Hulu, LLC, Fox Corporation, and Warner Bros. Discovery, Inc., *Defendants.*	Case No. 1:24-cv-01363-MMG-JEW

REBUTTAL EXPERT DECLARATION OF MICHAEL D. WHINSTON, PHD

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I. Introduction

I.A. Qualifications

(1) I am the Sloan Fellows Professor of Management at the MIT Sloan School of Management, Professor of Economics in the MIT Department of Economics, and a Partner at Bates White Economic Consulting. I received my BS in Economics from the Wharton School of the University of Pennsylvania in 1980, my MBA from the Wharton School in 1984, and my PhD in Economics from MIT in 1984.

(2) I am an economist, specializing in the fields of Microeconomics and Industrial Organization, and I regularly teach courses in both of these areas. I have published 45 peer-reviewed journal articles, three chapters for handbooks in the areas of industrial organization and organizational economics, and three books. One of these books is the leading graduate textbook in microeconomics, *Microeconomic Theory* (Oxford University Press, 1995). Another book, *Lectures on Antitrust Economics* (MIT Press, 2006), is widely used in PhD graduate courses on the subject. I also wrote the chapter covering empirical analysis of contracting in vertical markets that appeared in the most recent volume of the *Handbook of Industrial Organization* (Elsevier, 2021). In addition, I have served as a co-editor of the *RAND Journal of Economics*, the leading journal in the field of Industrial Organization. I have also been a visiting Fellow at Stanford University's Center for Advanced Study in the Behavioral Sciences. I am a Fellow of both the Econometric Society and the American Academy of Arts and Sciences. My academic writings have been recognized through several awards of distinction, including the 2019 Best Paper prize of the Association of Competition Economics for a paper titled "The Welfare Effects of Vertical Integration in Multichannel Television Markets." Most recently I have been named the recipient of the Toulouse School of Economics's 2024 Jean-Jacques Laffont Prize "awarded to a renowned international economist whose research, in the spirit of the work undertaken by Professor Jean-Jacques Laffont, combines both the theoretical and the empirical."

(3) I have also been retained as an economic expert in antitrust matters including collusion, merger, and monopolization cases. These assignments have included work for government agencies both in the United States and Canada, for private parties, and as a neutral expert for a US District Court judge. Most recently, I testified as an economic expert on behalf of the United States Department of Justice in its monopolization lawsuit involving Google Search.

(4) My curriculum vitae is Appendix A to this report. It contains additional information about my professional experience, including prior testifying experience.

I.B. Scope of charge

(5) I have been retained on behalf of The Walt Disney Company (hereinafter Disney), Fox Corporation (hereinafter Fox), and Warner Bros. Discovery, Inc. (hereinafter WBD), defendants in this case. Disney and its subsidiaries (ESPN, Inc. and ESPN Enterprises, Inc. (hereinafter ESPN)) along with co-defendants Fox and WBD, announced a joint venture on February 6, 2024, to establish a new sports-centric streaming service. Plaintiffs FuboTV Inc. and FuboTV Media Inc. (hereinafter Fubo) primarily seek a preliminary injunction to block the creation of this joint venture. Counsel for the defendants have asked me to review and evaluate the opinions contained in the declarations submitted by Mr. Jonathan Orszag regarding the joint venture's likely competitive effects and the appropriate antitrust markets within which to evaluate its impact. They have also asked me to consider whether the creation of the joint venture is likely to cause irreparable harm to Fubo through any anticompetitive effects.[1]

I.C. Materials relied upon

(6) In preparing this report, I was assisted by a staff of expert economists and economic analysts at the consulting firm Bates White. While engaged in this matter, I directed the activities of the team, made all final decisions concerning analytic methods and their implementation, and prepared this report.

(7) My analysis in this case includes a review of numerous materials including, but not limited to, data and documents produced through discovery, legal filings, deposition transcripts, academic research, and publicly available data and information. In directing my support team, I emphasized the importance of identifying materials for my review regardless of whether they were favorable to the positions of the plaintiffs or the defendants. Throughout this report I identify the materials I rely upon in forming my opinions. I have done so in order to make clear the factual predicates upon which my opinions rest. To the extent that I have referenced or relied on discovery documents and testimony in this report, I have done so to ensure that my economic analyses are predicated on an understanding of the facts and to utilize the relevant factual information in my economic analyses.

(8) A list of the materials upon which I relied when forming my opinions is provided in Appendix B. My work on this matter is ongoing, and my opinions are formed using the information available to me as of the date of this report. I reserve the right to amend or supplement this report if additional information is made available. If other expert reports come to my attention, I may choose to update my opinions or respond to such reports as necessary.

1 Updated Expert Declaration of Jonathan Orszag, June 24, 2024 [hereinafter "Updated Orszag Declaration"].

(9) Bates White is being compensated for my time on this matter at a rate of $1,750 per hour. Neither my compensation nor Bates White's compensation is in any way contingent upon the outcome of this litigation.

I.D. Summary of opinions

(10) This matter concerns Fubo's motion for a preliminary injunction blocking the creation of a new joint venture (JV) by Disney, Fox, and Warner Bros. Discovery that would offer a new "skinny" package of these firms' networks that include live sports content.

(11) The proposed JV will launch within a highly competitive video content creation and distribution industry that is experiencing rapid change, with increased entry into sports programming, increased competition for consumers' attention and spending, and a marked shift away from traditional "linear TV." Specifically, in recent years, internet distribution has transformed the industry. Whereas historically video distributors had to invest billions to build cable or satellite systems—and, once they made that investment, had exclusive access to consumers for years or even decades—streaming has changed all that, making entry into distribution vastly easier and resulting in massive entry by virtual multi-channel video programming distributors (vMVPDs), streaming subscription-based video-on-demand services (SVODs), ad-supported video-on-demand services (AVODs), direct-to-consumer (DTC) services (including sports-focused direct-to consumer video services), and free-ad-supported streaming TV services (FASTs), all of which compete with traditional cable, satellite and telco providers (MVPDs) for consumers' time, attention, and subscriber fees.[2]

(12) These new streaming services, some of which are sponsored by large, well-resourced tech firms like Apple, Google, Amazon, and Netflix, compete with traditional programmers for content, including sports content, and then compete to offer programming—including live sports programming—to subscribers. In addition, with regard to sports programming specifically, the sports leagues themselves—which ultimately have the market power over sports in this industry—have begun to offer DTC video services for consumers to access live sports programming outside the traditional linear TV ecosystem. The proliferation of these alternative options has contributed to "cord cutting," where some consumers choose to abandon MVPDs and vMVPDs altogether, and to the rise of "cord nevers"—a class of consumers who have never subscribed to an MVPD or vMVPD.

(13) Against this backdrop, and to try to attract cord nevers and stem cord cutting, the JV offers a new, differentiated product. The JV will primarily stream linear networks that have been available through MVPDs and vMVPDs for years but will contain only 14 networks, consisting of the JV members'

[2] An MVPD is a "multichannel video program distributor" (cable companies, satellite distributors, and telephone companies); vMVPD stands for "virtual multichannel video program distributor" (examples include Hulu + Live TV, Youtube TV, and Fubo). I discuss the various types of distributors in Section II.A.4.

(English-language) linear networks that contain live sports programming. This partial offering would allow the JV to offer its service at a lower price point than more comprehensive MVPD and vMVPD packages, yet at a higher price point and with more content than many standalone SVOD or DTC providers. The JV will *not* deliver any network exclusively; all of the JV's networks (as well as the many other networks and on-demand content containing live sports programming that are *not* included in the JV) will continue to be available through many other distributors. Put simply, the JV will offer a new low-priced, limited-content product aimed at consumers' evolving interests and preferences. It will not eliminate any of the JV members' current offerings nor the competition among the JV members in promoting them.

(14) Based on my economic analysis of the evidence that I have reviewed to date, I conclude that the JV is likely to have significant procompetitive effects that benefit consumers. The JV will introduce a new and differentiated product in the marketplace, increasing choice for consumers and competition among the many distribution services already available. And while the JV partners expect the JV to remain a niche product [redacted], if the JV members' contemporaneous business forecasts are correct, the JV will increase overall consumption of pay TV programming—most specifically by attracting a significant number of cord nevers and cord cutters to enter (or return to) the pay TV ecosystem that the JV members are a part of.

(15) I also conclude, contrary to Mr. Orszag's assertions, that the evidence does not indicate that the JV will harm either competition or consumers. Fubo and Mr. Orszag seem to suggest that creation of the JV is somehow *unfair* to Fubo (and other third-party pay TV distributors), and therefore harms competition among distributors of pay TV. But my understanding is that antitrust law aims to protect competition and consumers, not competitors. The salient economic question is not whether the JV is fair or good for Fubo—new entry is often bad for incumbents. Instead, the salient question is whether the JV would benefit *consumers*. As I noted above, the JV offers consumers a new, differentiated product that some will find more attractive than their current viewing choices and will likely benefit even those who don't subscribe to the JV through greater competition and lower prices.

(16) To counter those benefits, Mr. Orszag proposes two theories of harm to competition in the licensing of sports network programming to third-party MVPDs and vMVPDs that, he claims, would be caused by the introduction of the JV. First, inaccurately treating the JV as if it is a merger of the JV members, he asserts that the JV will increase the collective market power of the JV members in licensing their sports content to MVPDs and vMVPDs. Second, he asserts that the JV will give the JV members the individual incentive and ability to vertically foreclose third-party MVPDs and vMVPDs, including Fubo, raising the sports network programming prices they must pay to the JV members. In my opinion, there is no economic support for either proposition: as I explain briefly below and in much greater detail in the body of this report, Mr. Orszag's conclusions rely on flawed economic reasoning, limited (and often no) analysis of the evidence relevant to his claims and approaches that apply overly

narrow market definitions that fail to recognize the dynamic competitive landscape in which the JV will operate.

(17) In the remainder of this summary, I provide an overview of this report and of my specific criticisms of Mr. Orszag's claims.

(18) In Section II of this report, I discuss the dynamic nature of the industry and the many options available to consumers for obtaining live sports (and entertainment) content. This background is critical for making an informed economic assessment of the impact of the JV.

(19) In Section III, I demonstrate that Mr. Orszag's market definition analyses fail to consider many of the wide range of choices available to consumers seeking to purchase access to video content, and in particular live sports. His proposed downstream distribution markets (sales of MVPD and vMVPD video services to consumers, sales of vMVPD video services only to consumers, and sales of "skinny sports bundles" to consumers) improperly exclude from consideration important competition from the many other video distribution services that consumers can and do subscribe to—such as SVODs, AVODs, DTCs, and FASTs—that also include live sports programming.

(20) The availability of programming (including live sports) outside of pay TV (comprised of MVPDs and vMVPDs) has expanded rapidly in recent years, leading to a dramatic reduction in pay TV subscriptions and rapidly increasing subscriptions to SVOD services and specialized sports DTC services. Not only is this competition present now, but it has been and is highly likely to continue growing at a rapid rate as programmers, sports leagues, and new entrants into sports video distribution like Amazon and Apple enter with new alternatives to watching live sports. If consumers within one of Mr. Orszag's proposed markets were to face a significant increase in prices or diminution in quality of their MVPD or vMVPD services, many would likely switch to some combination of these alternatives that offer the sports and other video content they desire outside the pay TV ecosystem. And this response is virtually certain to get even stronger going forward.

(21) In fact, the offerings of these various distributors have been converging in recent years—with MVPDs and vMVPDs offering substantial VOD viewing possibilities, and with SVODs offering linear networks in addition to their VOD programming—to the point where it is difficult to even categorize them. (And, for live sports—there is not a difference in viewing linear networks and video on demand, as these events must be watched when they occur to have "live" viewing). For these reasons, it is important to consider the full range of consumer options—what I call an "all video distribution market"—to effectively analyze the issues in this matter. In contrast, Mr. Orszag either ignores or erroneously dismisses the relevance of these important options available to consumers.

(22) In Section III, I also discuss the flaws in Mr. Orszag's argument that the sale of sports network programming to pay TV distributors (MVPDs and vMVPDs) is a relevant market. One major flaw is

that most live sports programs are not necessarily close substitutes for each other. Some consumers, for example, prefer to watch only baseball and not basketball. Other consumers may prefer to watch numerous sports at different times of the year or day (and games of one sport typically do not overlap in schedule with other sports). In fact, from the perspective of MVPDs and vMVPDs trying to put together a package of programming that is desirable for consumers, different sports networks have an important element of complementarity. Consistent with that complementarity, most MVPDs and vMVPDs license sports network programming from all of the JV members. This point is important because it means that even if the JV *were* analogous to a horizontal merger of the JV members (which it most certainly is not), it would not necessarily lead to a significant increase in the market power of the JV members in licensing their sports networks. In addition, the ability of MVPDs and vMVPDs to substitute to non-sports programming or sports directly contracted from sports leagues, as well as the ability of consumers to switch away from MVPDs and vMVPDs to alternative viewing options, constrain the market power of sellers of sports network programming to MVPDs and vMVPDs.

(23) In Section IV, I discuss the flaws in Mr. Orszag's claims about harms the JV would supposedly cause in his purported market for licensing of sports network programming to MVPDs and vMVPDs. His conclusions rely on flawed economic reasoning, limited (and often no) analysis of the evidence relevant to his claims, and approaches that deliver and use overly narrow market definitions that fail to recognize the dynamic competitive landscape in which the JV will operate.

(24) In Section IV.A, I discuss Mr. Orszag's claim that creation of the JV will enhance the JV members' market power. Mr. Orszag's analogizing of the JV to a horizontal merger envisions a wholly different transaction than the reality of the JV. As I noted above, the JV will not eliminate any of the JV members' current offerings nor the competition among the members in promoting them. Both before and after the creation of the JV, the JV members each have an economic interest only in their own profit, in marked contrast to a horizontal merger that creates a single entity and eliminates all competition among the merger partners. Indeed, the joint DOJ/FTC *Antitrust Guidelines for Collaborations Among Competitors* emphasizes the benefits that collaborations such as the JV frequently bring to the marketplace and the differences between just collaborations and mergers. While a merger leads to a decrease in the number of competitors, the JV will result in the *creation* of a new firm and new product being offered alongside the individual JV members' other products and the many other ways consumers can receive video programming.

(25) Moreover, even if Mr. Orszag were correct to apply horizontal merger methodologies to the JV (which he most certainly is not), I show that he overstates the market shares of the JV members for the purpose of his merger analysis because he ignores rights retained by sports leagues, fails to recognize the fact that over time rights revert to leagues, who hold the ultimate power over sports telecasting, and fails to recognize the ever-increasing share of new direct buyers of sports media rights. Mr. Orszag also has no reliable basis for opining that the JV will facilitate or incentivize collusion between the defendants in their activities outside the JV.

(26) In Section IV.B, I discuss Mr. Orszag's assertion that the JV will lead the JV members to increase the prices of their sports network programming to MVPDs and vMVPDs, including to Fubo, harming competition and consumers. Mr. Orszag offers no analysis whatsoever to support this claim, leaving his argument no more than theoretical speculation. His avoidance of any engagement with actual evidence that bears on this issue leads him to incorrect and/or unsupported claims about the impact of the JV on both the *ability* and the *incentives* that the JV members each have when pricing their sports network programming. Regarding *ability*, Mr. Orszag ignores that each of the JV members' existing contractual commitments significantly curtail their ability to raise their affiliate fees to MVPDs and vMVPDs. Regarding *incentives*, Mr. Orszag presents no analysis of the likelihood or magnitude of any change in the pricing incentives of the JV members toward third-party MVPDs and vMVPDs that might be caused by the JV, completely failing to assess with evidence the many essential factors that go into a reliable assessment of the likelihood and magnitude of any threat of vertical foreclosure. Indeed, he completely fails to recognize the significance of the fact that the JV members earn more when a consumer subscribes to a third-party MVPD or vMVPD than when the consumer subscribes to the JV. In addition, Mr. Orszag fails to weigh the impact of any hypothetical price increase against the procompetitive benefits that the JV will bring.

(27) I also note in Section IV.B that, even leaving the above problems aside, Mr. Orszag's discussion confounds the effects of the creation of the JV with the effects of the JV members' ownership of the JV. A proper "but-for" world in this matter would instead focus only on the effects of that ownership, as even Mr. Orszag clearly would view the JV members' individually licensing their sports programming networks to a third-party provider that is offering a skinny sports package to consumers (e.g., Fubo or YouTube TV) as procompetitive.

(28) In Section V, I demonstrate that the JV will create substantial procompetitive benefits for consumers that have not been considered by Mr. Orszag. As noted above, by creating a new differentiated product and expanding consumer choice, the JV will benefit those consumers who prefer the JV to other options, including consumers who are not currently subscribing to any pay TV service. In addition, the JV is likely to put downward pressure on subscription prices of competing downstream distributors, benefitting even those consumers who do not subscribe to the JV.

(29) In Section VI, I show that Fubo's claims regarding irreparable harm are inconsistent with economics and the evidence. While Fubo's CFO, Mr. Janedis, predicts [redacted] notwithstanding the vast array of networks offered by Fubo but not by the JV and notwithstanding that Fubo subscribers spend the majority of their viewing hours on non-sports programming, and on networks that the JV does not offer. As a result, Fubo's model likely [redacted] as confirmed by the fact that Fubo's

model predicts [redacted] Regardless of the extent of diversion, Fubo subscribers have demonstrated a consistent pattern of adding, dropping, and then reactivating subscriptions as their preferences change, indicating that Fubo can recapture lost subscribers. Finally, and perhaps most significantly, harm to Fubo that arises because consumers prefer the JV's new differentiated offering to Fubo is not a result of anticompetitive actions, but rather is a result of the very competition that antitrust law seeks to promote.

II. The proposed transaction in the context of the video content creation and distribution industry

(30) This section describes basic facts about the economics of the video content creation and distribution industry and the transaction at issue that are relevant to my analysis.[3] I devote particular attention to sports programming, because that is a focus of the JV at issue and also because plaintiffs' allegations focus on live sports programming, but I also discuss other types of programming that may compete with sports programming either for distribution or for viewer attention.

(31) Section II.A below discusses the economics of the video content and distribution industry broadly, Section II.B describes the proposed JV, and Section II.C discusses the impact of the JV on the industry and on consumers.

II.A. The economics of the video content creation and distribution industry

(32) I first describe the three traditional levels of the supply chain involved in creating live sports video content and delivering it to viewers. The supply chain is generally similar for non-sports programming.[4] In both cases, broadly speaking, a content creator (*e.g.*, sports league, movie/TV studio) licenses the rights to distribute content to a programmer (*e.g.*, ESPN, NBC), which, after producing and in many cases enhancing that content, packages it onto its network and licenses the right to televise the network with the produced content to a distributor (*e.g.*, a "multichannel video programming distributor" (MVPD or vMVPD)).[5] The distributor makes that content available to consumers.

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3 In this report I use the term "video content creation and distribution industry" to refer to the production and distribution of professional video content to consumers, including sports content. For clarity, this grouping does not include user-created video content available to consumers on sites such as TikTok and Facebook. I refer to the distribution level of this industry as "video distribution services," which includes cable, satellite, and fiber-optic distribution (*e.g.*, Comcast, DirecTV, Verizon Fios) distribution through subscription and ad-supported video services over the Internet (*e.g.*, YouTube TV, Amazon Prime Video), and over-the-air broadcasts. I use the term "pay TV" to refer to video distribution services offered by MVPDs and vMVPDs, consistent with how I believe Mr. Orszag has used it. (Note, however, that some industry observers use this term in other ways, and I clarify meaning when discussing documents that use it in other ways.)

4 The supply chain for non-sports programming is somewhat distinct in that the programmers create much of their own content, which consists of news and entertainment programs.

5 A Multichannel Video Programming Distributor (MVPD) is a cable TV, satellite, or telco provider like Comcast, DirecTV, or Verizon Fios – the terminology originated at a time when these distributors made available only linear networks, although as I discuss these distributors now also typically offer video-on-demand. A virtual MVPD (vMVPD), such as YouTube TV or FuboTV, aggregates live and on-demand TV like an MVPD, except the content is distributed over the internet. Federal Communications Commission, "In re Communications Marketplace Report et seq." (Report FCC 18-181, December 26, 2018): ¶¶ 48, 82, https://docs.fcc.gov/public/attachments/FCC-18-181A1_Rcd.pdf.

(33) This simplified three-level framework is only a starting point for understanding competition in this industry, which has become much more fluid than this simple structure would imply. For example, a single firm may perform the functions of more than one level of this supply chain. The National Football League (NFL), for instance, in addition to licensing various telecast rights to programmers, produces and distributes its own content through the NFL Network.[6] Similarly, Amazon, a distributor through its Amazon Prime Video service, licenses and produces its own live sports content, including Thursday Night Football and five NASCAR Cup Series races.[7] As I will discuss below, the ability of sports leagues and programmers to distribute directly to consumers through subscription video on demand (SVOD) and other direct-to-consumer (DTC) services,[8] as well as the ability of distributors to acquire content directly from sports leagues, has fundamentally changed the economics of this industry, reducing the power of both programmers and distributors.

(34) Below I discuss the three levels of the supply chain in more detail as they apply to the delivery of live sports programming.

II.A.1. Sports broadcasting, programming, and distribution

(35) The delivery of live sports to consumers requires the creation and distribution of live sports programming. The three basic levels in the supply chain that creates and delivers this product, from upstream to downstream, are sports leagues (content creators), programming aggregators (programmers), and programming distributors (distributors).

(36) At a high level, sports leagues create live sports events and sell the rights to televise those events. Those rights are purchased by programmers, who produce the event and negotiate with distributors to

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6 The NFL Network channel distributes a variety of content including re-airs of previous games, documentaries, NFL news, and more. "NFL Network Schedule," NFL, accessed July 8, 2024, https://www.nfl.com/network/watch/nfl-network-live; The NFL Network is also home to seven exclusive games in 2024. "2024 NFL Network Games," NFL, accessed June 13, 2024, https://www.nfl.com/network/games.

7 Amazon MGM Studios, "Prime Video and NASCAR Announce New Seven-Year Media Rights Deal," news release, November 29, 2023, https://press.amazonmgmstudios.com/us/en/press-release/prime-video-and-nascar-announce-new-sevenyear-medi ("Surrounding each of its NASCAR Cup Series races, Prime Video will produce pre-race and post-race programming, bringing fans highlights and analysis ahead of all of the action on the track. Prime Video will also offer exclusive coverage of practice and qualifying for the first half of the NASCAR Cup Series season (excluding the Busch Light Clash, DAYTONA 500, Duel at Daytona, and NASCAR All-Star Race). Prime Video talent and production details will be announced at a later date."); Amazon MGM Studios, "Historic Exclusive Thursday Night Football Deal Between Prime Video and the NFL Now Set to Begin a Year Early in 2022," news release, May 3, 2021, https://press.amazonmgmstudios.com/us/en/press-release/historic-exclusive-ithursday-night-footballi.

8 Services like Netflix and Amazon Prime Video are known as subscription video on demand services, or SVODs. Cat Hausler, "SVOD, AVOD, TVOD: Video On Demand Models Explained," Mountain, accessed June 13, 2024, https://mountain.com/blog/svod-avod-tvod-video-on-demand-models-explained/ ("Subscription Video On Demand (SVOD) is a model of media distribution where consumers pay a recurring fee to gain unlimited access to a streaming platform's content library, ranging from films to TV shows."); I discuss these services later in Section II.A.4. I also discuss other DTC sports services below.

carry their programming. Distributors then show the sports event to consumers via traditional over-the-air broadcasting, cable, satellite, fiber-optic, or increasingly, the Internet.

(37) To illustrate these basic roles, consider the NFL's Sunday Night Football. The NFL, in its role as organizer and scheduler of the league, creates a Sunday night regular season game. The NFL then sells the rights to produce and televise that game to a programmer – in the case of "Sunday Night Football," to NBC.[9] NBC, in its role as programmer, produces the game on its network by filming it and providing associated commentary and other content. It licenses its network, which includes the Sunday Night Football game, to distributors such as MVPDs and vMVPDs, and also broadcasts it over the air.[10]

(38) The simplified sports league-programmer-distributor structure illustrated by this example has become less prevalent, however, as the sports telecasting landscape has moved away from this classic distribution model in recent years. In the example of Sunday Night Football, NBC now also distributes the game through its own SVOD service, Peacock, and produces Peacock-specific associated content.[11] More generally, today:

- <u>Sports leagues can bypass programmers and distributors and self-distribute live sports</u> through their DTC services including NFL+, MLB.TV, and NBA League Pass.
- <u>Programmers can self-distribute their own content in addition to using third-party distributors</u>. For example, ESPN's forthcoming ESPN Flagship, Peacock, and Paramount+ are each services that bypass third-party distributors and deliver programming directly from programmers to consumers via the Internet.
- <u>Distributors can purchase the rights to live sports directly from sports leagues and sometimes produce their own content</u>. Many large tech firms have been purchasing media rights from sports leagues, including Amazon, Apple, Google, Roku, and Netflix. Some of these new direct buyers

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9 Comcast, "NBCUniversal and NFL Reach 11-Year Extension & Expansion for Sunday Night Football, Primetime TV'S #1 Show," news release, May 18, 2021, https://corporate.comcast.com/press/releases/nbcuniversal-nfl-11-year-extension-expansion-Sunday-night-football.

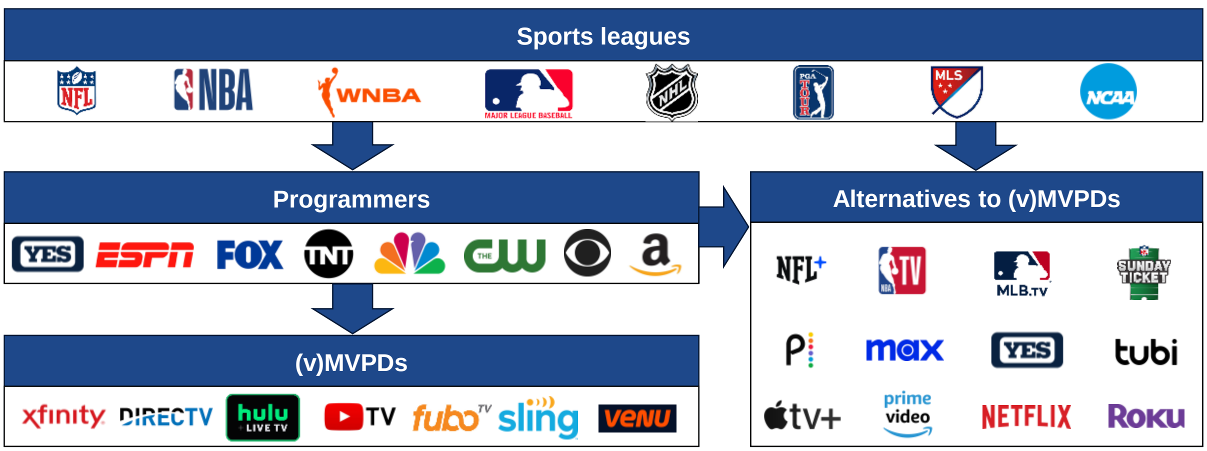
10 NBC is a broadcast network, and "consumers can receive this content via a television set connected to an antenna." Federal Communications Commission, "In re Communications Marketplace Report et seq." (Report FCC 18-181, December 26, 2018): ¶¶ 48, https://docs.fcc.gov/public/attachments/FCC-18-181A1_Rcd.pdf; According to Nielsen, "as of November 2023, more than 18% of U.S. TV households had at least one TV set enabled to receive free, broadcast programming. Given the many content options available to audiences, however, few homes rely solely on their digital antennas for TV content. Most complement their OTA access with content they can access from other sources." "Beyond Big Data: The Audience Watching Over the Air," *Nielsen*, January 2024, https://www.nielsen.com/insights/2024/beyond-big-data-the-audience-watching-over-the-air/.

11 Peacock also carries some unique content not telecasted on NBC, including the 2024 NFL opening weekend Friday night game in São Paulo and "exclusive Peacock Sunday Night Football Final returns with expanded postgame coverage following SNF each week." NBCUniversal, "2024 Sunday Night Football Schedule on NBC and Peacock," news release, May 16, 2024, https://www.nbcuniversal.com/article/2024-Sunday-night-football-schedule-nbc-and-peacock.

of sports rights, including Amazon and Apple, are playing the role of programmer as well by participating in the producing of the video content.[12]

(39) Figure 1 below illustrates the three basic levels of sports distribution and how they interact.[13] The arrows on the right show ways in which leagues, programmers, and distributors can interact outside of the simplified league → programmer → distributor framework. The figure also shows the various sports distribution alternatives to MVPDs and vMVPDs (together labelled "(v)MVPDs" in the figure) that have emerged in recent years, which I refer to collectively as "Alternatives to (v)MVPDs." I discuss these alternatives further below.

Figure 1. The three levels of sports distribution and how they interact



(40) In the rest of this section, I describe in more detail these three levels and how they interact, including a discussion of new entrants and new methods of distribution that impact each level.

[12] For example, Amazon produces its telecasts of Thursday Night Football and NASCAR races in addition to pregame and postgame and race shows. Apple TV+'s Friday Night Baseball is produced by MLB Network's production team in partnership with Apple's live sports production team. Jason Dachman, "Thursday Night Football Deep Dive: Amazon Prime Video Embraces HDR, AI, Next-Gen Stats in Year 2 of Exclusive NFL Package," *Sports Video Group*, August 24, 2023, https://www.sportsvideo.org/2023/08/24/thursday-night-football-deep-dive-amazon-prime-video-embraces-hdr-ai-and-next-gen-stats-in-year-two-of-exclusive-nfl-package/; Amazon MGM Studios, "Prime Video and NASCAR Announce New Seven-Year Media Rights Deal," news release, November 29, 2023, https://press.amazonmgmstudios.com/us/en/press-release/prime-video-and-nascar-announce-new-sevenyear-medi?ref_=a20m_us_blg_ces_fvemktrndv; Apple, "'Friday Night Baseball' Returns to Apple TV+ on March 29," news release, updated March 7, 2024, https://www.apple.com/newsroom/2024/03/Friday-night-baseball-returns-to-apple-tv-plus-on-march-29/; Hereinafter, "new direct buyers" refers to non-traditional rights holders like Amazon, Apple, Netflix, and Roku in contrast to traditional rightsholders like programmers, NBC, CBS, WBD, Disney, and Fox.

[13] While this figure focuses on the three levels of sports distribution, this same distribution structure exists in the broader video content creation and distribution industry.

II.A.2. Sports leagues

(41) Sports leagues including the NFL, NBA, MLB, NHL, and MLS oversee the scheduling, operation, and sales of the media rights to live sports events.[14] Sports leagues generate revenue in a variety of ways including through ticket sales, merchandise, sponsorship deals, and the licensing of media rights to programmers and other entities.[15]

(42) Media rights are a large source of revenue for sports leagues.[16] These rights are generally sold to the highest bidder, and the bidders for and winners of these rights have changed over time. Sports leagues, especially the most popular ones, commonly divide rights into several packages that are put out for bid separately.[17] For example, NFL media rights for the 2023–2033 seasons are divided

[14] Other leagues and sports organizations also follow this structure, including the PGA, NCAA, F1, WNBA, NWSL, and PLL. In addition, teams sometimes own media rights to certain of their live sports events and negotiate distribution themselves. The New York Yankees, for example, broadcasts the majority of games on the YES Network, a New York RSN which primarily covers Yankees and Brooklyn Nets games, and which is partially owned by the Yankees themselves. Alex Sherman, "YES Network Launching Streaming Service tot Give Non-Cable Viewers Access to Yankees Games," *CNBC*, March 29, 2023, https://www.cnbc.com/2023/03/29/yes-network-launching-streaming-service.html; Similarly, the Boston Red Sox, which is owned by Fenway Sports Group, broadcasts the majority of its games on the New England Sports Network, a Boston RSN, which is also majority owned by Fenway Sports Group. Alex Sherman, "Red Sox Broadcaster Becomes First Regional Sports Network to Offer Stand-Alone Streaming Service for Games," *CNBC*, June 1, 2022, https://www.cnbc.com/2022/06/01/red-sox-broadcaster-to-offer-streaming-service-outside-of-cable-bundle.html; In addition to distributing through MVPDs and vMVPDs, both RSNs offer DTC streaming apps, and YES partners with Amazon to show 21 New York Yankees games exclusively on Amazon Prime Video. "YES Network Introducing Direct-To-Consumer Subscription Product Today," YES Network, March 29, 2023, https://www.yesnetwork.com/news/yes-network-introducing-direct-to-consumer-subscription-product-today; "NESN 360," NESN, accessed June 12, 2024, https://nesn.com/nesn360/; Christian de Looper, "How to Watch New York Yankees Games on Prime Video," *Amazon*, June 5, 2024, https://www.aboutamazon.com/news/entertainment/how-to-watch-yankees-game-on-prime-video.

[15] Kurt Badenhausen, "How Sports Teams, Leagues and Owners Make Money," *Sportico*, February 16, 2024, https://www.sportico.com/feature/how-sports-teams-leagues-make-money-1234766931/.

[16] For example, according to Sportico, 67% of the NFL's revenue and 54% of the NBA's revenue came from "National Revenue" or "Local Media" which includes sports RSN rights. Kurt Badenhausen, "How Sports Teams, Leagues and Owners Make Money," *Sportico*, February 16, 2024, https://www.sportico.com/feature/how-sports-teams-leagues-make-money-1234766931/; According to Investopedia, "[t]he NFL earns the lion's share of its money with TV deals." Jakob Eckstein, "How the NFL Makes Money," *Investopedia*, updated February 1, 2024, https://www.investopedia.com/articles/personal-finance/062515/how-nfl-makes-money.asp.

[17] Leagues do not always license rights in multiple packages, however. For example, Formula 1 (F1) is exclusively telecast on Disney's networks. Similarly, the Olympics have historically been telecast by one company, typically a broadcast network. Nate Saunders, "ESPN Sign Deal to Continue to Broadcast F1 in United States," *ESPN*, October 22, 2022, https://www.espn.com/f1/story/_/id/34852984/espn-sign-deal-continue-broadcast-f1-united-states; "List of US Olympic TV Rights Deals," *Fox Sports*, May 9, 2014, https://www.foxsports.com/stories/olympics/list-of-us-olympic-tv-rights-deals; John-Paul O'Sullivan and Scott Robson, "Global Sports Rights Update, H2 2023: Industry Awaits NBA and EPL Renewals," *S&P Global Market Intelligence*, November 24, 2023, https://www.capitaliq.spglobal.com/apisv3/spg-webplatform-core/news/article?id=78433864. © 2024 S&P Global Market Intelligence (and its affiliates, as applicable) (individually and collectively, "S&P"). Reproduction of any information, data or material, including ratings ("Content") in any form is prohibited except with the prior written permission of S&P. S&P does not guarantee the accuracy, adequacy, completeness, timeliness or availability of any Content and is not responsible for any errors or omissions (negligent or otherwise), regardless of the cause, or for the results obtained from the use of such Content. In no event shall S&P be liable for any damages, costs, expenses, legal fees or losses (including lost income or lost profit and opportunity costs) in connection with any use of the Content. A reference to a particular investment or security, a rating or any observation concerning an investment that is part of the Content is not a recommendation to buy, sell or hold such investment or security, does not address the sustainability of an investment or security and should not be relied on as investment advice. Credit ratings are statements of opinions and are not statements of fact.

among Amazon, ESPN/ABC, NBC, Fox, CBS, Google, and Netflix, in addition to telecast rights the NFL retains for itself.[18] Similarly, MLB rights for the 2024 season are divided among ESPN, Fox, TBS, Apple TV+, Roku, and various regional sports networks (RSNs), in addition to telecast rights the MLB retains for itself.[19]

(43) The number of bidders for sports media rights has increased over time, along with the revenue sports leagues have obtained by selling their media rights. I next discuss each of these trends.

II.A.2.a. Increasing number of bidders and rights holders

(44) In recent years, newer entrants into live sports telecasting like Amazon, Apple, Google, and Netflix have joined traditional sports programmers such as ABC/ESPN, NBC, CBS, Fox and WBD in bidding for the media rights of major sports.[20] Figure 2 shows the bidders and rights holders by league and contract period for the most recent three negotiations with five of the most significant leagues, with bidders outside of the traditional sports programmers in bold.[21]

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18 Netflix recently announced that it had acquired the rights to broadcast NFL Christmas Day games from 2024–2026. Christmas Day in 2024 falls on a Wednesday, and it will feature a doubleheader. Netflix acquired the rights to at least one Christmas Day game in each of the two subsequent years. Nicole Sperling, "Netflix and the NFL Sign a Three-Season Deal," *The New York Times*, May 15, 2024, https://www.nytimes.com/2024/05/15/business/media/netflix-nfl-live.html; Prior to the 2024 season, Christmas Day NFL games, when they occurred, were typically broadcast on the network which had rights to games appearing on that day of the week. "Report: Big Bidding Expected for NFL Christmas Games," *Reuters*, March 28, 2024, https://www.reuters.com/sports/report-big-bidding-expected-nfl-christmas-games-2024-03-28/.

19 Roku recently acquired the exclusive rights to 18 Sunday morning MLB games. MLB, "Roku Lands Exclusive Rights to Major League Baseball Sunday Leadoff," news release, May 13, 2024, https://www.mlb.com/press-release/press-release-roku-lands-exclusive-rights-to-major-league-baseball-sunday-leadoff. See Figure 2.

20 Deposition of James Pitaro, June 17, 2024 [hereinafter "Pitaro Deposition"], 71:6–12 [redacted] Deposition of Dan Fox, June 14, 2024 [hereinafter "D. Fox Deposition"], 27:15–20 [redacted] Deposition of Bob Iger, June 20, 2024 [hereinafter "Iger Deposition"], 81:24–82:13 [redacted]

21 Pitaro Deposition, 71:21–72:11 [redacted]

Figure 2. Bidders and rights holders for sports league telecast rights by league and contract period for the three most recent negotiations

League	Year range	Bidders	Rights holders
NFL	2023–2033	**Amazon**, **Apple**, Comcast, Disney, Fox, **Google**, **Netflix**, Paramount	NFL, **Amazon**, Comcast, Disney, Fox, **Google**, **Netflix**, Paramount
	2014–2022	AT&T, **Amazon**, Comcast, Disney, Fox, Paramount, WBD	NFL, AT&T, **Amazon**, Comcast, Disney, Fox, Paramount
	2006–2013	AT&T, Comcast, Disney, Fox, Paramount	NFL, AT&T, Comcast, Disney, Fox, Paramount
NBA	2025–2035	**Amazon**, **Apple**, Comcast, Disney, **Google**, **Netflix**, WBD	To be announced
	2016–2024	Disney, Fox, WBD	NBA, Disney, WBD
	2008–2015	Disney, WBD	NBA, Disney, WBD
MLB	2022–2028	**Apple**, **Barstool**, Comcast, Disney, Fox, **Google**, **Roku**, WBD	MLB, **Apple**, Comcast, Disney, Fox, **Roku**, WBD
	2014–2021	Comcast, Disney, **Facebook**, Fox, **Google**, WBD	MLB, Disney, **Facebook**, Fox, **Google**, WBD
	2007–2013	Comcast, Disney, Fox, WBD	MLB, Disney, Fox, WBD
NHL	2021–2027	Comcast, Disney, WBD	NHL, Disney, WBD
	2011–2020	Comcast, Disney, Fox, WBD	NHL, Comcast
	2005–2010	Comcast, Disney	NHL, Comcast
MLS	2023–2032	**Apple**, Disney	MLS, **Apple**
	2015–2022	Comcast, Disney, Fox, Univision	MLS, Disney, Fox, Univision
	2007–2014	AXS, Comcast, Disney, Fox, Univision	MLS, AXS, Comcast, Disney, Fox, Univision

Source: Compiled from public sources. See my backup.
Note: Participants and winners of sports rights negotiations are attributed to the parent company of the relevant networks as of today. Other than AT&T's ownership of DirecTV's Sunday Ticket rights and the Turner Networks' rights between 2018-2022, no two parent companies' sports rights ownership overlap. ABC and ESPN are collectively referred to as Disney, and TNT and TBS are collectively referred to as WBD. Participants and winners in bold are new direct buyers of sports rights. Participants and winners are only included if they bid on and/or won rights to exclusive packages; winners of so-called "exclusive digital rights," for example, are not included unless that platform is the only way to watch games. Starting in 2023, Fox has non-exclusive rights to simulcast some MLS games.

(45) Notably, a number of these new bidders are large tech companies with substantial financial resources and very possibly a better ability to monetize content through targeted advertising than traditional programmers, given their detailed data on individual viewers of their content.[22]

[22] Tripp Mickle, Kevin Draper, and Benjamin Mullin, "Why Big Tech Is Making a Big Play for Live Sports," *The New York Times*, July 24, 2022, https://www.nytimes.com/2022/07/24/technology/sports-streaming-rights.html ("Emboldened by their deep pockets and eager to boost viewership of their streaming-subscription services, Apple and Amazon have thrust themselves into negotiations for media rights held by the National Football League, Major League Baseball, Formula One racing and college conferences."); Jacob Feldman, "Why the Biggest Tech Companies are Suddenly Streaming Sports," *Sportico*, May 28, 2024, https://www.sportico.com/business/tech/2024/why-sports-streaming-economics-bundle-fracture-nfl-netflix-1234781987/ ("Tech companies have also wooed leagues with the precise data they're able to gather on viewers and potential viewers, valuable information for sports executives building out international marketing strategies."); "*Thursday Night Football* on Prime Video," Amazon Ads, accessed June 26, 2024, https://advertising.amazon.com/thursday-night-football ("The 2023 TNF season brought new and enhanced ad opportunities for advertisers. Fresh innovations, such as audience-based creative and interactive video ads, helped brands connect with audiences, upping the ante for engagement and relevancy. Remarketing also enabled advertisers to continue the conversation with TNF audiences after the final whistle, by reengaging TNF viewers across other Amazon products."); Deposition of Eric Shanks, June 27, 2024 [hereinafter "Shanks Deposition"], 139:12–18 [redacted]

II.A.2.b. Increasing rights fees

(46) The cost of US media rights for the five largest sports leagues (by revenue)—including the NFL, NBA, MLB, NHL, and MLS—has increased substantially over time.[23] For instance, the average annual price for the NFL's media rights increased 372% from the 1998–2005 period to the latest period, 2023–2033, to over $11 billion annually. Similarly, the average annual price for MLB media rights increased from $340 million in 1996–2000 to $1.8 billion for the 2022–2028 period. While negotiations for NBA rights in the 2025–2035 period have not been finalized, they are expected to amount to $6.9 billion annually, a 1,027% increase over the 1998–2001 period.[24]

(47) Figure 3 below shows the substantial increases in the average annual contract prices for the NFL, NBA, MLB, and NHL since the early 1980s.[25]

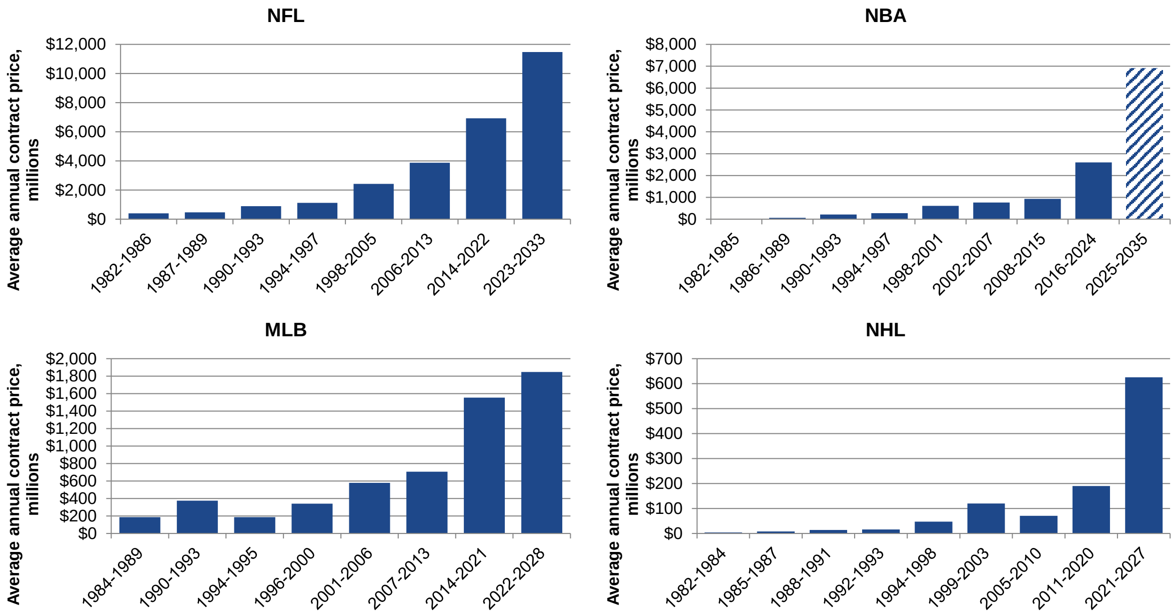
[redacted]

23 *See* Kurt Badenhausen, "How Sports Teams, Leagues, and Owners Make Money," *Sportico*, February 16, 2024, https://www.sportico.com/feature/how-sports-teams-leagues-make-money-1234766931/; Tim Baysinger, "U.S. Sports Media Rights Value to Reach $30B by 2025," *Axios*, April 12, 2023, https://www.axios.com/pro/media-deals/2023/04/12/sports-media-rights-value; TWDC_FUBO_00077313, at -316 [redacted] Deposition of Bruce Campbell, June 24, 2024 [hereinafter "Campbell Deposition"], 361:10–22 [redacted]

24 Compiled from public sources. See "01 Contract values over time by league.xlsx" in my backup.

25 In Appendix C, I show average annual contract prices in constant dollars. My conclusions remain the same.

Figure 3. Average annual contract price of NFL, NBA, MLB, and NHL rights



Source: Compiled from public sources, see my backup; "Fox Corporation (FOXA.O)," *Citi Research*, February 6, 2024, 2; John-Paul O'Sullivan and Scott Robson, "Global Sports Rights Update, H2 2023: Industry Awaits NBA and EPL Renewals," *S&P Global Market Intelligence*, November 24, 2023.
Note: The total value of the newest NBA contract is reported to be about $76 billion over 11 years, or just under $7 billion per year. The data include the value of rights to major programmers and ad-hoc deals with direct buyers, but the contract periods are based on the years of the leagues' contracts with the major programmers, with the exception of the 2014–2022 NFL period, which combines Disney's 2014-2021 and 2022 contracts into one. The drop in MLB rights between 1994 and 2000 is due to the 1994 player strike that ended the season and cancelled the Postseason and uncertainty over collective bargaining agreements. The drop in NHL rights between 2003 and 2005 is due to the lockout during the 2004-2005 season.

(48) These increases in contract prices for live sports content are a result, to a significant degree, of the increased competition for these rights, which I discussed above in Section II.A.2.a.[26]

II.A.3. Programmers

(49) Programmers, traditionally including, for example, Disney, Fox, WBD, NBC, and CBS, purchase media rights from sports leagues, produce live sports and other associated content, incorporate this content across their broadcast and cable networks such as ESPN, TNT, and FS1 and distribute it through third-party distributors or their own distribution channels.[27] In the case of some networks,

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[26] Pitaro Deposition, 56:25–57:1 [redacted] Deposition of Todd Mathers, June 27, 2024 [hereinafter "Mathers Deposition"], 81:7–9 [redacted] Campbell Deposition, 361:15–22 [redacted].

[27] Federal Communications Commission, "In re Communications Marketplace Report et seq." (Report FCC 18-181, December 26, 2018): ¶ 48, https://docs.fcc.gov/public/attachments/FCC-18-181A1_Rcd.pdf ("Television Broadcasters:

like Disney's ABC, the Fox broadcasting network, WBD's TNT, TBS, and truTV, Comcast's NBC and USA Network, and Paramount's CBS, sports content is distributed on the same channel as news and other general entertainment content.[28]

(50) Another important category of sports programmers is RSNs. RSNs are programmers who specialize in broadcasting sports events of particular local or regional interest, such as non-nationally telecast MLB, NBA, or NHL games.[29] RSNs purchase sports rights directly from teams, produce live sports and other associated content, and primarily distribute that content through third-party distributors.[30] Some RSNs distribute games through their own streaming services.[31] An RSN's programming covers teams within a designated local market, and viewers only have access to a particular RSN's programming if they are within that RSN's local market.[32]

(51) More recent entrants into live sports distribution such as Amazon and Apple also provide their own programming services, directly purchasing rights from sports leagues, producing sports content, and distributing sports content through their own downstream services such as Amazon Prime Video and Apple TV+.[33]

These entities broadcast video content over the air, and consumers can receive this content via a television set connected to an antenna. Participants in this category include local television stations affiliated with broadcast networks (*e.g.*, ABC, CBS, FOX, and NBC), independent commercial television stations, and noncommercial educational television stations.").

28 The percentages of primetime telecasts coded as sports for the "Big Four" English-language broadcast networks are 8%, 5%, 28%, and 20%, for ABC, CBS, Fox, and NBC, respectively. Rick Porter, "How Much Sports Matter (or Don't) to Network Viewership," *The Hollywood Reporter*, May 9, 2022, https://www.hollywoodreporter.com/tv/tv-news/how-much-broadcast-networks-depend-sports-1235143456/.

29 "What Regional Sports Networks area Available on Fubo?" Fubo, updated June 25, 2024, https://support.fubo.tv/hc/en-us/articles/115005322088-What-Regional-Sports-Networks-are-available-on-Fubo (According to Fubo's Help Center, "If a national network (NBA TV, NBC, etc) has an exclusive broadcast, only that national network will provide that game. If a national network and regional sports networks are airing the same game, there may be blackouts based on where you're located.").

30 Bally Sports, operated by Diamond Sports Group, a subsidiary of Sinclair Broadcast Group, has 18 owned and operated RSNs. Bally Sports RSNs produce "over 4,500 live local professional telecasts each year" for 42 teams throughout 18 local markets. In early 2024, Amazon purchased a minority stake in Bally Sports. Diamond Sports Group, "Diamond Sports Group Enters into Restructuring Support Agreement that Provides Framework for Comprehensive Reorganization Plan to Emerge from Chapter 11 as a Going Concern," news release, January 17, 2024, https://www.businesswire.com/news/home/20240116881748/en/Diamond-Sports-Group-Enters-into-Restructuring-Support-Agreement-that-Provides-Framework-for-Comprehensive-Reorganization-Plan-to-Emerge-from-Chapter-11-as-a-Going-Concern; "Bally Sports," Sinclair, accessed June 19, 2024, https://sbgi.net/sports/regional-sports-networks/; "Investor Relations," Sinclair, accessed June 19, 2024, https://sbgi.net/investor-relations/diamond-sports-group/.

31 For example, Bally Sports and the Yes Network have associated DTC services, Bally Sports+ and the Yes App, respectively. I discuss these services more in Section II.A.4.c. Yes Network's app telecasts New York Yankees, Brooklyn Nets, and New York Liberty games. "Packages," Bally Sports, accessed June 26, 2024, https://www.ballysports.com/packages; "YES Network Introducing Direct-To-Consumer Subscription Product Today," YES Network, March 29, 2023, https://www.yesnetwork.com/news/yes-network-introducing-direct-to-consumer-subscription-product-today.

32 A user could purchase an out-of-market streaming service, such as MLB.TV, NBA League Pass, or NFL Sunday Ticket, which I discuss later, to gain access to games that are not otherwise available within their market.

33 Jason Dachman, "Thursday Night Football Deep Dive: Amazon Prime Video Embraces HDR, AI, Next-Gen Stats in

(52) In addition to producing live sports events, programmers produce and air sports-related news, analysis, and commentary programs that air during other times of the day. For example,

- ESPN airs "SportsCenter," a daily sports news and highlights show which initially debuted in 1979,[34] "First Take," a daily debate show discussing the latest sports news and events, and "The Pat McAfee Show," a weekday sports talk and discussion program, among others.[35]
- Fox airs "Undisputed," a daily morning sports show featuring conversations about daily sports news with analyst Skip Bayless,[36] "The Herd with Colin Cowherd," a daily sports talk show covering the top stories of the day helmed by Colin Cowherd,[37] and "First Things First," a daily sports talk show that explores the biggest sports news and events.[38]
- TNT airs "Inside the NBA," an Emmy-winning basketball-centric talk show that airs before, during, and after its nationally-televised NBA games, which features a mix of highlights, interviews, commentary, debates, and jokes hosted by Ernie Johnson with analysis from Charles Barkley, Kenny Smith, and Shaquille O'Neal.[39] TBS airs "MLB on TBS," a 30-minute pregame and postgame show, covering the latest news and highlights from MLB.[40]
- Amazon Prime Video airs pre- and post-race programming surrounding each of its NASCAR Cup Series races.[41]

Year 2 of Exclusive NFL Package," *Sports Video Group*, August 24, 2023, https://www.sportsvideo.org/2023/08/24/thursday-night-football-deep-dive-amazon-prime-video-embraces-hdr-ai-and-next-gen-stats-in-year-two-of-exclusive-nfl-package/; Amazon MGM Studios, "Prime Video and NASCAR Announce New Seven-Year Media Rights Deal," news release, November 29, 2023, https://press.amazonmgmstudios.com/us/en/press-release/prime-video-and-nascar-announce-new-sevenyear-medi?ref_=a20m_us_blg_ces_fvemktrndv; Apple, "'Friday Night Baseball' Returns to Apple TV+ on March 29," news release, updated March 7, 2024, https://www.apple.com/newsroom/2024/03/friday-night-baseball-returns-to-apple-tv-plus-on-march-29/.

34 Dan Levy, "ESPN's SportsCenter Continues to Change World of Sports After 50,000 Episodes," Bleacher Report, September 13, 2012, https://bleacherreport.com/articles/1332984-espn-sportscenter-continues-to-change-the-world-of-sports-after-50000-episodes.

35 ESPN Press Room, "ESPN Continues Record-Setting Ratings Across Morning Studio Shows for the Month of April," news release, May 8, 2024, https://espnpressroom.com/us/press-releases/2024/05/espn-continues-record-setting-ratings-across-morning-studio-shows-for-the-month-of-april/.

36 "Undisputed About," Fox Sports, accessed June 21, 2024, https://www.foxsports.com/shows/undisputed/about.

37 "About," The Herd Now, accessed July 7, 2024, https://www.theherdnow.com/featured/the-herd-with-colin-cowherd/about/.

38 "First Things First About," Fox Sports, accessed May 29, 2024, https://www.foxsports.com/shows/first-things-first/about.

39 Jason Jones, "Amid TV Uncertainty, 'Inside the NBA' Continues to be an Entertainment Blueprint," *The Athletic*, May 23, 2024, https://www.nytimes.com/athletic/5488048/2024/05/23/tnt-inside-the-nba-future-legacy/.

40 Warner Bros. Discovery, "MLB on TBS Announces First Half of 2024 Regular Season Schedule," news release, January 24, 2024, https://press.wbd.com/emea/ca/media-release/tnt-sports/mlb-tbs-announces-first-half-2024-regular-season-schedule.

41 Amazon MGM Studios, "Prime Video and NASCAR Announce New Seven-Year Media Rights Deal", news release, November 29, 2023, https://press.amazonmgmstudios.com/us/en/press-release/prime-video-and-nascar-announce-new-sevenyear-medi.

- Apple TV+ airs "MLS Countdown" and "MLS Wrap-Up," pregame and postgame coverage in both English and Spanish featuring a variety of hosts and analysts. Apple TV+ also co-produces MLS 360, a show that "provides live look-ins from every match alongside expert analysis and discussion."[42]

(53) Programmers traditionally licensed their produced content via carriage agreements with MVPDs or vMVPDs. Programmers licensing their content to distributors in this way earn revenue in the form of affiliate fees or broadcasting retransmission fees on a per-subscriber basis, as well as from advertising.[43] Increasingly, traditional programmers have also distributed their content directly to viewers through their own distribution services – for example Peacock (NBC), Paramount+ (CBS), Max, ESPN+, or the forthcoming ESPN Flagship product.[44] I discuss these direct distribution channels in more detail in Section II.A.4.b.

(54) As I discussed above, some newer programmers do not sell through third-party distributors at all but instead distribute exclusively through their own platforms. For instance, Amazon and Apple have acquired significant live sports media rights in recent years and have bypassed traditional MVPD and over-the-air distribution in favor of distribution via their own Internet streaming services.[45]

(55) The increasing competition both upstream for sports rights and downstream at the programming and distribution levels that I mentioned above and will discuss further below generally has hurt the profitability of traditional sports programmers in recent years. For instance, Figure 4 shows ESPN's operating margin, programming expenses (which include sports rights), and non-programming expenses (which include technology and other distribution costs) from 2014–2023. ESPN's operating margin has declined an average of 6.6% annually from 40.4% in 2014 to 24.6% in 2023. The decline in operating margins is driven to a significant degree by growth in programming expenses.[46]

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42 MLS, "Major League Soccer Unveils its Broadcast Talent Team for MLS Season Pass on Apple TV," news release, February 15, 2024, https://www.mlssoccer.com/news/major-league-soccer-unveils-its-broadcast-talent-team-for-mls-season-pass-on-app.

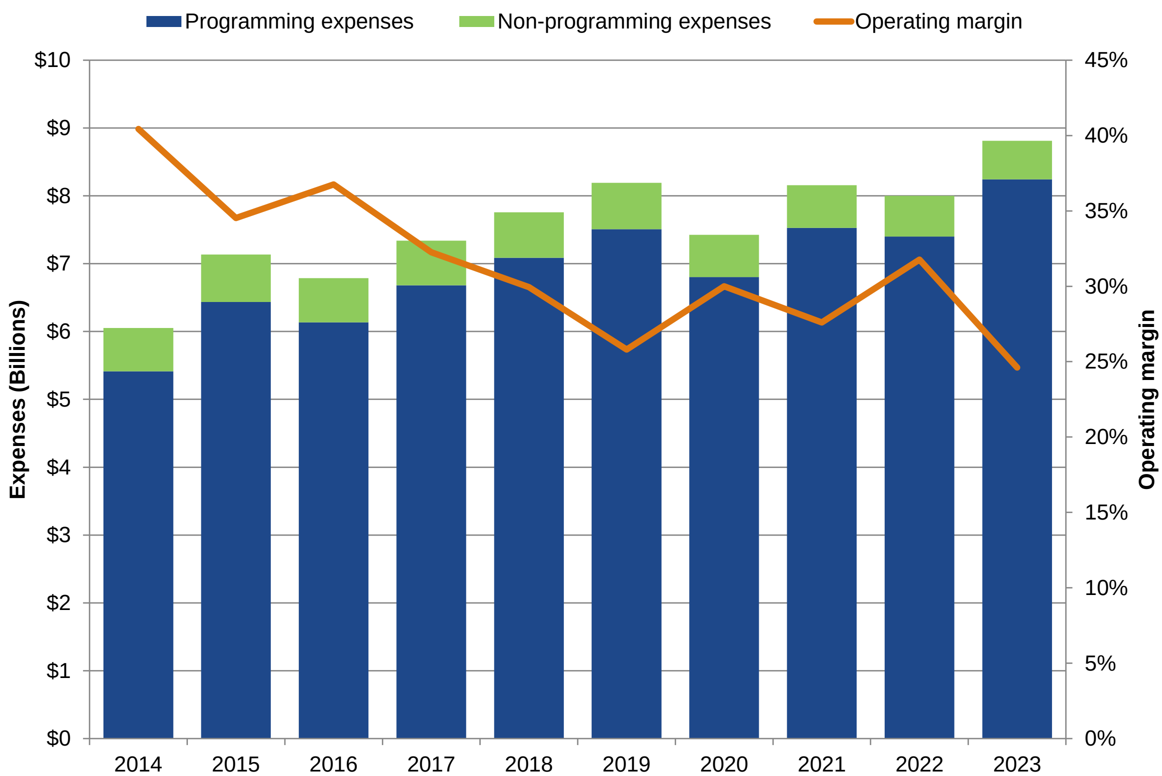
43 Retransmission fees are payments made to broadcast networks from MVPDs and vMVPDs for the rights to retransmit their content. Federal Communications Commission, "In re Communications Marketplace Report et seq." (Report FCC 18-181, December 26, 2018): ¶ 100, https://docs.fcc.gov/public/attachments/FCC-18-181A1_Rcd.pdf; D. Fox Deposition, 24:6–13 [redacted]

44 Pitaro Deposition, 173:4–6 [redacted] Pitaro Deposition, 41:17–18 [redacted] Alex Sherman, "ESPN Will Launch its Own Streaming Service in Fall 2025, Alongside Joint Venture," *CNBC*, February 7, 2024, https://www.cnbc.com/2024/02/07/espn-will-launch-its-flagship-direct-to-consumer-service-in-fall-2025.html ("The service will include all of ESPN's programming and feature new personalization and integration with ESPN's fantasy platforms and ESPN Bet.").

45 Tripp Mickle, Kevin Draper, and Benjamin Mullin, "Why Big Tech Is Making a Big Play for Live Sports," *The New York Times*, July 24, 2022, https://www.nytimes.com/2022/07/24/technology/sports-streaming-rights.html.

46 ESPN's programming expenses are driven by the cost of acquiring sports rights, which account for 40% of ESPN's

Figure 4. ESPN operating margin, 2014–2023



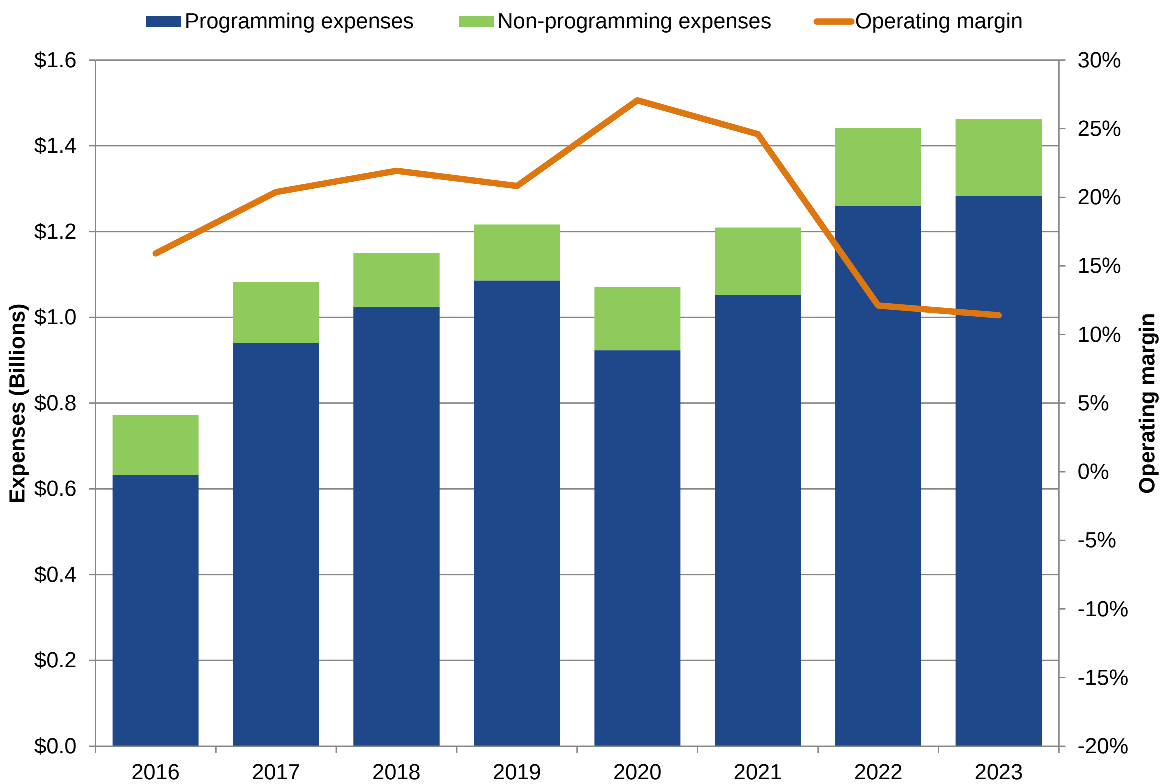
Source: S&P Global Market Intelligence, "TV Network Summary," accessed May 21, 2024, https://www.capitaliq.spglobal.com/web/client?auth=inherit#industry/tv_NetworksSummary.
Notes: All values are global. Includes both ESPN and EPSN2. The decrease in programming expenses in 2020 is partially due to deferrals for events that were pushed to fiscal year 2021 (NBA, MLB, and college football). The Walt Disney Company, *Form 10-K*, November 25, 2020, 42.

(56) Similarly, Figure 5 shows Fox's sports segment's operating margin. Fox Sports saw a steady increase in operating margin from its 2013 reorganization until 2020.[47] From 2020 to 2023, Fox Sports' operating margin declined by over half from a peak of 27.1% in 2020 to 11.4% in 2023. Like ESPN, the decline in Fox Sports' operating margin is driven to a significant degree by growth in programming expenses.

programming costs. ESPN has seen its spend on programming expenses explode in recent years as they bid against "deeper-pocketed tech companies." As a result of the increasing cost of sports rights ESPN has had to "cut back in other areas – primarily original programming – and relied more heavily on a handful of its most famous personalities." The Walt Disney Company, *Form 10-K*, November 21, 2023, 44, 55, 61; Kevin Draper and Brooks Barnes, "How ESPN Went from Disney's Financial Engine to Its Problem," *The New York Times*, August 2, 2023, https://www.nytimes.com/2023/08/02/business/media/espn-disney.html.

47 Fox Sports launched FS1 in late 2013, bringing a national, 24-hour sports channel under the Fox brand. FS1 was launched with the goal of becoming a serious competitor to ESPN in two to three years. Figure 6 excludes the first two years following the launch of FS1, 2014 and 2015, due to the volatility in these years. David Lieberman, "Fox Sports 1 To Launch on August 17," *Deadline*, March 5, 2013, https://deadline.com/2013/03/fox-sports-channel-launch-446055/.

Figure 5. Fox Sports operating margin, 2016–2023



Source: S&P Global Market Intelligence, "TV Network Summary," accessed May 21, 2024, https://www.capitaliq.spglobal.com/web/client?auth=inherit#industry/tv_NetworksSummary.
Notes: All values are global. Includes both Fox Sports 1 and Fox Sports 2. The decrease in 2020 programming expenses is partially due to the postponement of live sports events. Fox Corporation, *Form 10*-K, August 10, 2020, 40.

II.A.4. Distributors

(57) Distributors link programmers with viewers. Historically, live sports and other televised entertainment was distributed through over-the-air broadcasting along with MVPDs—cable operators, telcos, and satellite operators.[48] More recently, a variety of new "streaming" platforms also distribute content over the Internet. The new platforms most central to distribution of sports content are:[49]

1. Virtual MVPDs (vMVPDs): vMVPDs are MVPDs that are distributed over the Internet rather than over a wired cable, wired telephone, or satellite signal connection. Examples include YouTube TV, Hulu + Live TV, Fubo, and Sling TV.

[48] *See* Federal Communications Commission, "In re Communications Marketplace Report et seq." (Report FCC 18–181, December 26, 2018): ¶¶ 47–48, https://docs.fcc.gov/public/attachments/FCC-18-181A1_Rcd.pdf.

[49] The nomenclature used to describe these services can vary. For example, a streaming service like Peacock, owned by NBC, may be called an "SVOD" in some contexts, and an NBC "DTC" product in others. For clarity, I use only one of the four classifications below for each service. For example, I label Peacock an SVOD, and not a DTC service.

2. Subscription Video on Demand services (SVODs): Historically, these distributors offered on-demand content and charged a subscription fee. However, increasingly, they offer live content including live sports. Examples include Amazon Prime Video, Netflix, Peacock (owned by NBC), Max (owned by WBD), the forthcoming ESPN Flagship, and Paramount+ (owned by Paramount). Ad-supported video on demand services (AVODs) are similar to SVODs but do not charge a subscription fee.[50]

3. Other Direct-To-Consumer (DTC) streaming services from sports leagues and programmers. Increasingly, sports leagues and RSNs have introduced their own DTC distribution services focused entirely on sports. These include single-sport streaming apps from sports leagues such as NFL.TV, MLB.TV, as well as streaming apps from RSNs such as Bally Sports+ and YES.[51]

4. Free Ad-Supported Streaming Television (FAST): These services, available for free to consumers, offer a wide selection of live and on-demand content over the Internet, including sports. Examples of FAST services are Pluto TV (owned by Paramount), Tubi (owned by Fox), Freevee (owned by Amazon), and The Roku Channel.[52]

(58) Below, I discuss the distribution of sports through each of these channels, starting with MVPDs and vMVPDs.[53] A key point is that there has been substantial convergence in recent years in the services offered by these various types of distributors. This convergence has resulted in the lines between different types of distribution at times blurring, but I discuss them by type to highlight the distribution channels that are in Mr. Orszag's proposed markets and those that are not.

II.A.4.a. MVPDs and vMVPDs

(59) While MVPDs and vMVPDs traditionally offered packages of "linear" network programming to consumers, they now often offer on-demand content as well.[54] Their linear networks include live

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50 Cat Hausler, "SVOD, AVOD, TVOD: Video On Demand Models Explained," Mountain, accessed June 13, 2024, https://mountain.com/blog/svod-avod-tvod-video-on-demand-models-explained/.

51 "Packages," Bally Sports, accessed July 2, 2024, https://www.ballysports.com/packages; "Sign Up," YES, accessed July 2, 2024, https://signup.watchyesnetwork.com/.

52 Emma Roth, "These are the FAST Services You Need to Know About," *The Verge*, April 29, 2023, https://www.theverge.com/23680217/fast-services-tubi-roku-pluto-tv.

53 SVODs and DTC streaming services often offer a mix of on demand and live content (including live sports). As such, the distinction between SVODs and DTC streaming services can be unclear, and the nomenclature is often used differently by different industry observers. Together, DTC, SVODs, and FASTs make up alternatives to (v)MVPDs for viewing live sports and other sports-related content.

54 Linear programming is content shown on a network that follows a fixed schedule. Linear programming is considered to be "live" TV because consumers watching a show on a linear network are watching it in real time as it is telecast (some shows, such as sports events, are also considered "live" regardless of whether they are shown on a linear network since they also are watched in real time.) Some MVPDs and vMVPDs include VOD content alongside linear networks. For example, YouTube TV includes an on-demand library for its users with content from most of its networks. As another example, Fubo advertises its library of live and on-demand sports, shows, and movies on its website, [redacted] Further, Verizon Fios includes VOD content as well. Jeremy Laukkonen, "How to Use YouTube TV On Demand," *Lifewire*, July 11, 2020,

sports and other sports programming alongside other content such as news and entertainment programming. The vast majority of MVPDs and vMVPDs contain programming from all the major sports programmers and offer packages of various sizes and price points.[55]

(60) MVPDs include traditional cable companies like Charter, Comcast, and Cox, satellite broadcasting services like DirecTV and DISH Network, and telecom companies like Verizon Fios.

(61) vMVPDs are a more recent phenomenon than MVPDs and are distinguished from MVPDs largely by their delivery over the Internet.[56] As I document in Section III.B.2, vMVPDs and MVPDs offer similar packages and price points. The category began with the launch of Sling TV in 2015, and has seen entry in recent years from DirecTV Stream, which launched in 2016, YouTube TV (2017), Hulu + Live TV (2017), and Fubo (2017).[57] To access vMVPD content, consumers need an internet connection in their home and a method of access such as a smart TV, streaming dongle, phone or tablet, but no other equipment.[58] Entry into providing vMVPD services is easier than entry into

https://www.lifewire.com/how-to-use-youtube-tv-on-demand-5070880; "Watch Movies with Fubo," Fubo, accessed June 26, 2024, https://www.fubo.tv/stream/ca/fubo-movie-network; FUBO_0168358 at -367, 402–407; "Fios On Demand and Pay Per View (PPV)," Verizon, accessed June 29, 2024, https://www.verizon.com/support/residential/tv/programs-features/fios-vod-ppv; Federal Communications Commission, "In re Communications Marketplace Report et seq." (Report FCC 18–181, December 26, 2018): ¶ 48, https://docs.fcc.gov/public/attachments/FCC-18-181A1_Rcd.pdf ("MVPD packages typically include linear channels – both cable channels and retransmitted broadcast channels – and video on demand (VOD) content.").

55 Gino Amora, "H2 2023 virtual multichannel packaging and pricing update," S&P Capital IQ Market Intelligence, January 29, 2024, https://www.capitaliq.spglobal.com/apisv3/spg-webplatform-core/news/article?id=80132033; SNL Kagan Research Sports Report 2024, https://www.capitaliq.spglobal.com/apisv3/spg-webplatform-core/news/article?id=80961673. The five major sports programmers are Comcast (NBC), Disney (ESPN), Fox, Paramount (CBS), and WBD. Brent Schrotenboer, "Sports Streaming Deal with ESPN, Fox and Warner Bros. Discovery: What It Means for Viewers," *USA Today*, February 7, 2024, https://www.usatoday.com/story/sports/media/2024/02/07/sports-streaming-app-espn-fox-warner-bros-viewers-know/72501606007/.

56 I discuss the convergence of delivery mechanisms between MVPDs and vMVPDs in Section III.B.2.

57 Emily Steel, "Dish Network Unveils Sling TV, a Streaming Service to Rival Cable (and It Has ESPN)," *New York Times*, January 5, 2015, https://www.nytimes.com/2015/01/06/business/media/dish-network-announces-web-based-pay-tv-offering.html; DirecTV stream was launched in 2016 as DirecTV Now and was rebranded to AT&T TV Now in 2019, and then finally DirecTV stream in 2021. Chris Welch, "AT&T's DirecTV Now Launches November 30th over 100 channels of streaming TV," The Verge, November 28, 2016, https://www.theverge.com/2016/11/28/13766274/att-directv-now-streaming-tv-service-announced-release-date; Scott Moritz, "AT&T's New Online TV Service Looks a Lot Like Current Deals," Bloomberg, August 19, 2019, https://www.bloomberg.com/news/articles/2019-08-19/at-t-s-new-online-tv-service-looks-a-lot-like-current-offerings; Alexander Maxham, "What Is DIRECTV Stream? Everything You Need To Know," *Android Headlines*, March 24, 2024, https://www.androidheadlines.com/directv-stream; Fubo first launched in 2015, but as a soccer-only streaming service. It transitioned to a more comprehensive pay TV service in 2017. "Sports-First OTT Service FuboTV Officially Launches Out of Beta," *Sports Video Group*, April 10, 2017, https://www.sportsvideo.org/2017/04/10/sports-first-ott-service-fubotv-officially-launches-out-of-beta; Julia Boorstin, "YouTube Officially Launches YouTube TV in Select Markets," *CNBC*, April 5, 2017, https://www.cnbc.com/2017/04/05/youtube-officially-launches-youtube-tv-in-select-markets.html; Hulu, "Hulu Launches New Live TV Streaming Service, Adds Channels from Scripps Networks Interactive," news release, May 3, 2017, https://press.hulu.com/hulu-launches-new-live-tv-streaming-service-adds-channels-from-scripps-networks-interactive.

58 For example, Fubo subscribers can watch on smart TVs, streaming dongles or "connected devices," mobile phones, and tablets. "What Devices Can I Watch Fubo on?" Fubo Help Center, accessed July 2, 2024, https://support.fubo.tv/hc/en-us/articles/115002183228-What-devices-can-I-watch-Fubo-on.

traditional MVPD provision because, unlike a traditional MVPDs, a vMVPD does not need to provide a dedicated cable or fiber optic line into a consumer's home, or satellite infrastructure.[59]

(62) As I noted above, the primary difference between MVPDs and vMVPDs has historically been the method of delivery of the content, with MVPDs delivering content via cable, satellite, and fiber optic lines, and requiring dedicated equipment installed in a subscriber's home, such as a cable set-top box.[60]

(63) These distinctions have blurred in recent years, however. For example, since the launch of vMVPDs, MVPDs have increasingly used delivery equipment other than the traditional set-top box, that is more akin to a smart TV or streaming dongle used to deliver vMVPD content.[61] An example is the Xumo Stream Box, used by Charter and Comcast, which plugs directly into a smart TV without a cable connection, and provides live TV from the MVPD alongside streaming apps.[62] I discuss new methods of delivery for MVPDs more in Section III.B.2.

(64) Figure 6 shows shares of subscribers among MVPDs and vMVPDs from 2016 to 2023.

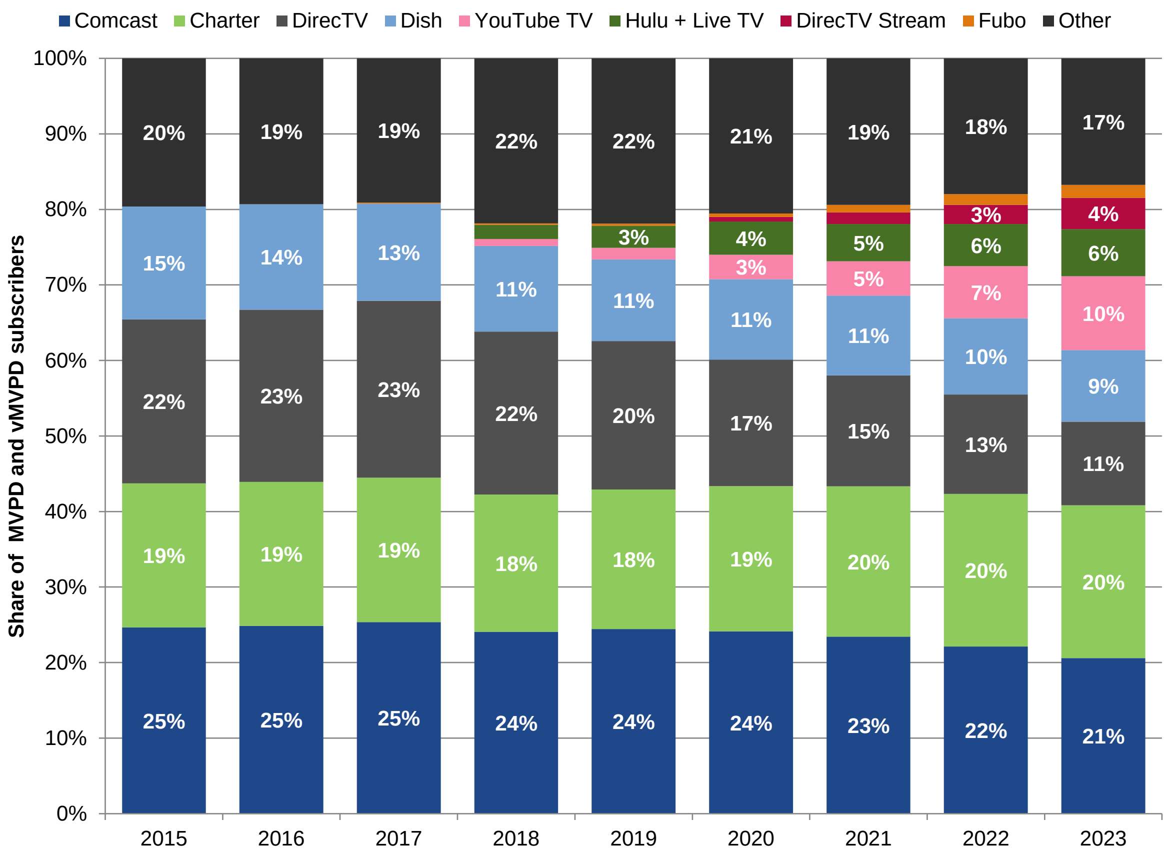
[59] Home internet is often provided on a dedicated fiber optic or cable line, however, so a vMVPD service effectively uses that infrastructure for its service delivery.

[60] Delivery of content via cable, satellite, and fiber optic lines through dedicated equipment is increasingly becoming less of the case as MVPDs create streaming based alternatives to access their packages. I discuss these changes in Section III.B.2. See Cox TV, Comcast, and DirecTV equipment requirements. "Cox TV Equipment," COX. accessed May 29, 2023, https://www.cox.com/residential/tv/tv-equipment.html; "Gemini Device," DirecTV, accessed May 29, 2024, https://www.directv.com/technology/gemini/; "What's Included in an X1 Getting Started Kit," Xfinity, accessed May 29, 2024, https://www.xfinity.com/support/articles/what-is-included-in-an-x1-self-install-kit; Also see FCCs new guidelines prohibiting MVPDs from improperly charging consumers for equipment. "Section 642/TVPA Requirements," Federal Communications Commission, December 20, 2022, https://www.fcc.gov/enforcement/areas/section-642-tvpa-requirements.

[61] A smart TV is "[a]n Internet-enabled TV set that includes free and paid streaming apps such as YouTube, Netflix, Amazon Prime and Hulu." Viewers can make any TV with an HDMI port a smart TV by connecting a streaming media player like an Apple TV or a streaming dongle like an Amazon Fire Stick to their TV. "Smart TV," PC Mag, accessed June 28, 2024, https://www.pcmag.com/encyclopedia/term/smart-tv; "Fire TV," PC Mag, accessed June 28, 2024, https://www.pcmag.com/encyclopedia/term/fire-tv; "Apple TV," PC Mag, accessed June 28, 2024, https://www.pcmag.com/encyclopedia/term/apple-tv.

[62] The largest four MVPDs allow consumers to stream their MVPD services. Spectrum TV, Xfinity Stream, DirecTV Stream and DISH Anywhere allow customers to stream live TV and On Demand content on any device, anywhere. Comcast also launched NOW TV, a skinny streaming bundle that allows subscribers to stream 40+ live and On Demand channels through the Xfinity Stream app. "Spectrum TV App," Spectrum TV, accessed June 6, 2024, https://www.spectrum.com/cable-tv/streaming/spectrum-tv-app; "Stream," Xfinity, accessed June 5, 2024, https://www.xfinity.com/stream/; "Now TV," Xfinity, accessed June 6, 2024, https://www.xfinity.com/nowtv; "Watch Live Streaming Channels," MyDish, accessed June 5, 2024, https://support.dish.com/services/dish-anywhere/live-streaming-channels; DirecTV Stream is a separate service from DirecTV's satellite offering.

Figure 6. Shares of subscribers among MVPDs and vMVPDs in the United States, 2016–2023

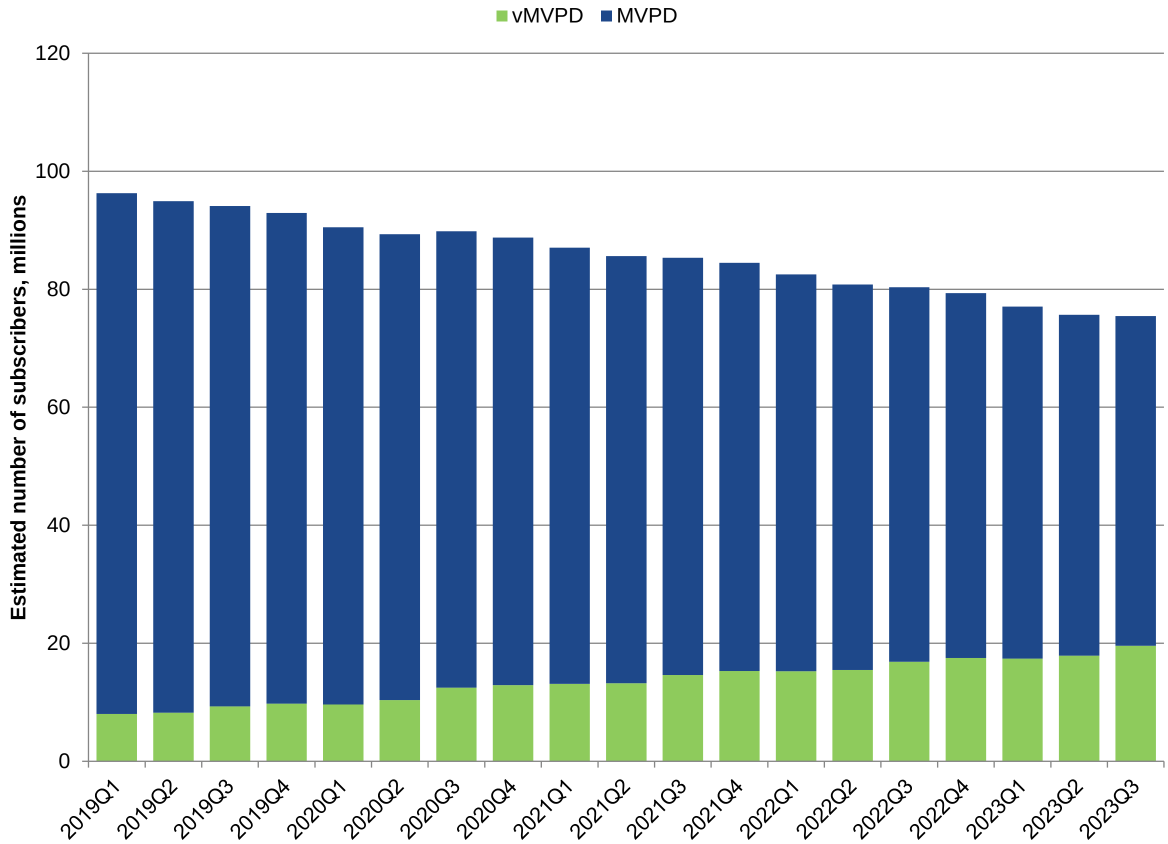


Source: S&P Global Market Intelligence estimates, "US subscribers for select US video subscription services, Q1 2015 to Q4 2023," Capital IQ Pro, accessed July 2, 2024.
Note: Sling TV launched in 2015, but S&P Global started to report subscriber estimates beginning in 2016.

(65) The rise of the Internet as a means of distribution and the associated entry of vMVPDs and the other alternative services that I discuss below has had a dramatic effect on where consumers view video content.[63] The number of MVPD subscribers has declined in recent years while the number of vMVPD subscribers has grown. Yet, as consumers' alternatives to both MVPDs and vMVPDs have proliferated, the growth in vMVPDs has not offset the decline in subscribers to MVPDs, as shown in Figure 7. As I discuss in Section II.C, the JV members aim to attract consumers who have migrated away from vMVPD and MVPDs (as well as those who never did subscribe to one of those services) to the JV's new differentiated service.

[63] As Mr. Trautman notes, "the competitive positioning of traditional MVPDs faced a new challenge around 2015 with the marketplace entry of internet-based alternatives to traditional MVPDs that became known as vMVPDs." Updated Expert Declaration of James Trautman, May 24, 2024 [hereinafter "Updated Trautman Declaration"], ¶ 32.

Figure 7. Growth in vMVPD subscribers has not offset the decline in MVPD subscribers



Source: S&P Global Market Intelligence, "US multichannel video market share trends, Q1 2021" and "US multichannel video market share trends, Q3, 2023."

II.A.4.b. SVODs

(66) SVODs, a category which includes services such as Netflix, Amazon Prime Video, and Peacock, historically focused on video-on-demand rather than live or linear programming. But that focus has changed in recent years as SVODs have increasingly shown live programming, often sports content, alongside their video-on-demand content.

(67) In the case of SVODs owned by programmers, such as Peacock (NBC), Paramount+ (Paramount), and Max (WBD), the linear and live content shown on the SVOD is often the same content shown through MVPDs or vMVPDs.[64] In these cases, the SVOD provides the programmer a direct link to

[64] D. Fox Deposition, 44:16–21 [redacted]

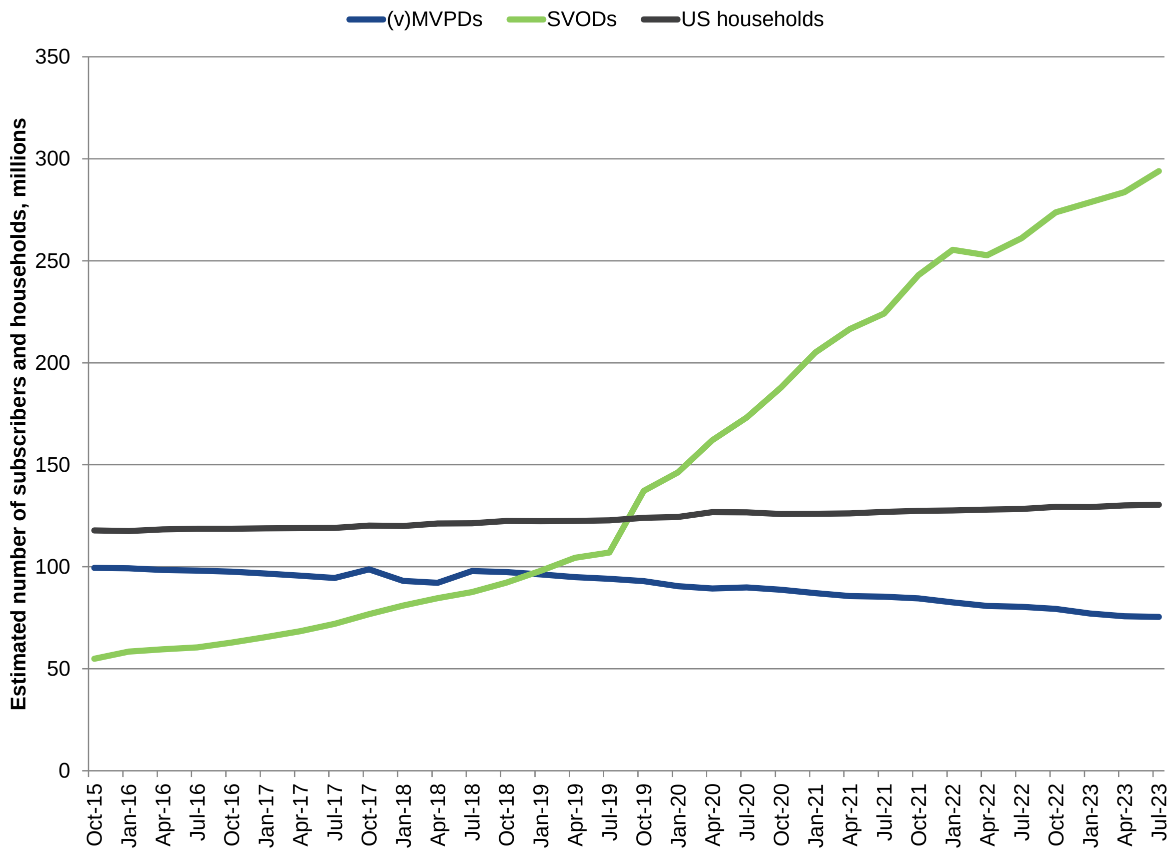
consumers, and sometimes shows content not available on the programmer's other channels, such as Peacock's exclusive telecasts of certain NFL games.[65]

(68) Other SVODs, such as Amazon Prime Video and Apple TV+, were not originally programmers, but have begun to produce their own programming. This includes licensing substantial sports content directly from sports leagues, as shown in Figure 2 above.

(69) While aggregate subscribership in MVPDs and vMVPDs has been declining, the number of SVOD subscriptions has increased substantially in recent years, as shown in Figure 8.

65 NBCUniversal, "2024 Sunday Night Football Schedule on NBC and Peacock," news release, May 16, 2024, https://www.nbcuniversal.com/article/2024-sunday-night-football-schedule-nbc-and-peacock.

Figure 8. Subscriptions to SVOD services have grown rapidly while subscribers to MVPDs and vMVPDs have declined



Source: S&P Global Market Intelligence, "Leading US video provider rankings, Q4 2023," Capital IQ Pro, https://www.capitaliq.spglobal.com/apisv3/spg-webplatform-core/news/article?id=80793883&KeyProductLinkType=33&redirected=1; FRED Economic Data, "Total Households (TTLHH)," 2023, https://fred.stlouisfed.org/series/TTLHH. Disney+ launched in November 2019.
Note: FRED US household data used for "Households" line. SVOD estimates are aggregated, counting the total number of SVOD subscribers, not the total number of SVOD subscriptions. vMVPD data are not available before July 2018.

(70) SVODs, generally priced at $5–$10 a month for the entry-level tier with ads, are individually substantially cheaper than vMVPD and MVPD offerings, but offer a narrower set of live content.[66] Consumers generally subscribe to more than one SVOD, whereas they most often subscribe to only

66 SVOD ad-free entry-level tiers are generally priced at $9–$18. Amazon Prime Video is included with an Amazon Prime membership at $14.99. However, users can upgrade to Prime Video Ad Free for $3. Colin Dixon, "The Top 7 SVODs are Half the Cost of Traditional Pay TV," *nScreen Media*, January 15, 2024, https://nscreenmedia.com/top-7-svod-cost-jan-2024/; "Upgrade to Go Ad Free," Amazon, accessed June 27, 2024, https://www.amazon.com/gp/help/customer/display.html?nodeId=TD5EYJIUGQMY13QQdi; Meara Isenberg, "No More Ads on Prime Video: Ditch Commercials for a Price With These Steps," *CNET*, February 24, 2024, https://www.cnet.com/tech/services-and-software/how-to-break-up-with-prime-video-with-ads-and-go-ad-free/; see Figure 10 for examples of SVOD services with live sports offerings. Note that these services offer fewer live sports options than MVPD or vMVPD bundles. FOX-057328, at -351.

one MVPD or vMVPD. Figure 9 shows that most consumers subscribe to two or more SVOD services.

Figure 9. Most SVOD subscribers have multiple SVOD subscriptions, Q3 2023

Number of SVOD services used	Total respondents	Sports viewing households	Non-sports viewing households
0	17%	15%	25%
1	16%	15%	18%
2	14%	14%	15%
3	12%	12%	11%
4	12%	13%	9%
5+	29%	32%	22%

Source: S&P Global Market Intelligence, "Sports viewer crosstab, Q3 2023," Capital IQ Pro, accessed July 3, 2024.
Notes: Answers to "Which of the following online video subscription services do you or someone in your household currently use" among a sample of 2,500 households and 1,886 sports viewing households (sports viewing households indicated that they viewed sports in their households).

(71) Though each SVOD offers a narrower range of sports than is typically found on an MVPD or vMVPD, a combination of several SVODs can provide a much wider range of sports coverage. Figure 10, taken from an October 2023 Fox presentation, shows the range of sports available on popular SVODs.

[redacted]

(72) A programmer with an SVOD can bypass MVPDs and vMVPDs to offer live sports streaming, alongside video-on-demand content, directly to consumers (they can and do often do so *in addition to* offering that same content through MVPDs and vMVPDs). Prominent SVODs owned by large programmers offer substantial sports content. For instance:

- Peacock (NBC) offers live sports including events like Sunday Night Football, Premier League Soccer, the Olympics, Big Ten games, PGA Tour events, and more.[67]
- Paramount+ (Paramount) offers live sports like NFL on CBS and UEFA Champions League matches.[68] Paramount+ also has a premium option, Paramount+ with SHOWTIME, which provides additional sports access like The PGA Tour, March Madness, and Big Ten football.[69]
- Max (WBD) provides live sports via the Bleacher Report add-on, including NBA, NHL, March Madness, MLB, and more.[70]
- ESPN+ allows consumers to stream "thousands of live events from the best leagues and biggest tournaments in the world" including events from the NFL, MLB, NHL, PGA Tour, NCAA, UFC, La Liga, Bundesliga, US Open of Tennis, Wimbledon, and more.[71] While ESPN+ offers many live events, it does not offer any linear channels, not even ESPN.[72] According to S&P Global, 11% of US internet households have a subscription to ESPN+.[73] ESPN+ is also the exclusive home to multiple leagues' DTC streaming services including NHL Power Play and PGA Tour Live.[74]
- ESPN Flagship is the forthcoming streaming service from ESPN that "[w]ill combine all of ESPN linear and ESPN+ into one innovative product for sports fans."[75] The service will feature new

67 "Stream Live Sports & Events," Peacock, accessed July 8, 2024, https://www.peacocktv.com/sports.

68 "Pick Your Plan," Paramount+, accessed July 8, 2024, https://www.paramountplus.com/.

69 "Pick Your Plan," Paramount+, accessed July 8, 2024, https://www.paramountplus.com/.

70 "B/R Sports on Max," Max, accessed July 8, 2024, https://www.max.com/sports; D. Fox Deposition, 34:10–35:4 [redacted]

71 "Stream Live Sports and ESPN+ Originals," ESPN, accessed June 27, 2024, https://plus.espn.com/.

72 Disney CEO, Bob Iger, said that the company "plans to launch a stand-alone product that features ESPN's flagship channels as a streaming offering." However, this service has not been released. The Walt Disney Company "ICYMI: CEO Bob Iger Addresses Disney's Strength, Growth, and Momentum at Morgan Stanley Conference," news release, March 8, 2024, https://thewaltdisneycompany.com/bob-iger-disney-morgan-stanley-conference/.

73 See chart titled "Sports subscription services used in the US, Q3 2023." Scott Robson et al., "Sports Report 2024," *S&P Global Market Intelligence*, April 1, 2024, https://www.capitaliq.spglobal.com/apisv3/spg-webplatform-core/news/article?id=80961673.

74 Kevin Ota, "ESPN+ Launches 'NHL Power Play', New Brand for 1,050 Out-of-Market Games," *ESPN*, October 7, 2022, https://espnpressroom.com/us/press-releases/2022/10/espn-launches-nhl-power-play-new-brand-for-1050-out-of-market-games/; Kevin Ota, "PGA Tour Live Coming Exclusively to ESPN+," *ESPN*, March 10, 2020, https://espnpressroom.com/us/press-releases/2020/03/pga-tour-live-coming-exclusively-to-espn/.

75 The Walt Disney Company, *DEFA14A*, March 2024, 16.

personalization and integration with ESPN's fantasy platforms and ESPN Bet.[76] The service is planned to launch in Fall 2025.[77]

(73) Other SVODs, including Amazon Prime Video, Apple TV+, and Netflix have increasingly acquired sports rights directly from major sports leagues, bypassing traditional sports programmers.

- Amazon Prime Video offers consumers live sports content in addition to video-on-demand and has been increasing its sports portfolio in recent years.[78] According to Fox's consumer research, [redacted][79] Prime Video began exploring the acquisition of sports telecast rights in 2016.[80] Within five years, Amazon had committed to spend at least $15.6 billion on a variety of sports telecast rights.[81] Prime Video's sports lineup currently includes NFL Thursday Night Football, NASCAR, the New York Yankees (MLB), Seattle Kraken (NHL), Premier Boxing, NWSL, WNBA, and MMA.[82] Amazon is a participant in the latest negotiations for NBA's broadcast rights that begins with the 2025–26 season.[83] In 2024, Amazon invested $115 million in the Diamond Sports Group to become a minority owner, and now offers MLB, NHL, and NBA local content associated with Bally's Sports RSNs.[84]
- Apple TV+ offers live sports in addition to video-on-demand content. According to Fox's consumer research, [redacted][85] In 2022, Apple secured the rights to a Friday-night package of MLB games. In the $85 million seven-year deal, Apple TV+ has exclusive rights to telecast two Friday Night Baseball games

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76 Alex Sherman, "ESPN Will Launch Its Own Streaming Service in Fall 2025, Alongside Joint Venture," *CNBC*, February 7 2024, https://www.cnbc.com/2024/02/07/espn-will-launch-its-flagship-direct-to-consumer-service-in-fall-2025.html; "About," ESPN Bet, accessed July 7, 2024, https://about.espnbet.com/ ("ESPN BET is a newly-branded online sportsbook operated by PENN Entertainment that combines ESPN's industry-leading brand and multiplatform reach with PENN Entertainment's proprietary in-house technology and deep sportsbook operational expertise.").

77 The Walt Disney Company, *DEFA14A*, March 2024, 16.

78 Prime Video is offered as both a stand-alone and as part of Amazon's Prime bundle of services. Steven Cohen and Sarah Saril, "Prime Video Lets You Stream Popular Movies and Original Shows – Here's How to Sign Up," *Business Insider*, January 30, 2024, https://www.businessinsider.com/guides/streaming/what-is-prime-video.

79 FOX-045899, at -930.

80 Shalini Ramachandran, "Amazon is Exploring a Possible Premium Sports Package with Prime Membership," *Dow Jones*, November 12, 2016, https://www.dowjones.com/scoops/amazon-exploring-possible-premium-sports-package-prime-membership/.

81 Jack Benjamin, "The High Price of Amazon and Apple's Entry into Live Sports," *The Media Leader*, August 22, 2024, https://the-media-leader.com/the-high-price-of-amazon-and-apples-entrance-into-live-sports/.

82 Prime Video also allows for access to sports through premium channel add-ons such as on MLB.TV, NBA League Pass, NBA TV, Paramount+. "Prime Video Sports," Amazon, accessed May 21, 2024, https://press.amazonmgmstudios.com/us/en/sports.

83 Jimmy Traina, "Amazon Prime Expected to Be Major Player in NBA's Broadcast Future," *Sports Illustrated*, May 7, 2024, https://www.si.com/nba/2024/05/07/amazon-prime-nba-tv-rights-espn-tnt.

84 As part of the investment in Diamond Sports, Amazon will provide local channels through Prime Video adding 37 teams across the MLB, NHL, and NBA to the streaming platform. Prime Video will be filling the role of Bally Sports+ to provide local fans without cable the ability to purchase DTC access to stream local Diamond channels. Alden Gonzalez, "What the New Diamond-Amazon Deal Means for MLB, NBA, NHL," *ESPN*, January 18, 2024, https://www.espn.com/mlb/story/_/id/39333324/diamond-amazon-streaming-mlb-nba-nhl.

85 FOX-045899, at -930.

each week, totaling about 50 a season.[86] In 2023, Apple TV+ reached a ten-year, $250 million per season deal for the exclusive rights to stream MLS games. MLS Season Pass on Apple TV+ allows fans to watch every match without local blackouts or restrictions.[87] Consumers can purchase MLS Season pass as a standalone product or jointly with Apple TV+ at a slight discount.[88] Apple's deal represents an almost three-fold increase in value from the previous MLS rights deals, which averaged $90 million per season.[89]

- Netflix, the largest SVOD in the United States by subscribers with approximately 83 million paying subscribers as of the first quarter of 2024, had traditionally focused on sports entertainment instead of live sports, but is beginning to offer live sports as well.[90] This follows the success of its sports-adjacent content and docuseries such as "The Quarterback," "Formula 1: Drive to Survive," and "Break Point."[91] Netflix has recently reached deals with WWE and the NFL to broadcast live sports. In 2024, Netflix reached a 10-year, $5 billion deal to exclusively broadcast WWE's Monday Night Raw beginning in 2025.[92] Also in 2024, Netflix reached a three-season, $75 million per game deal to be the global home of the NFL's two Christmas Day Games.[93]

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86 Mike Ozanian, "MLB Deals with Apple and NBC Sports Are Worth aa Combined $115 Million Annually," *Forbes*, March 14, 2022, https://www.forbes.com/sites/mikeozanian/2022/03/09/mlb-deals-with-apple-and-peacock-worth-115-million-annually-combined/?sh; the games will only be available on Apple TV+, will not be available via team RSNs or MLB.TV, and will not be subject to local blackout restrictions. Maury Brown, "MLB Inks Streaming Deal with Apple for Exclusive Friday Night Doubleheader Games," *Forbes*, March 8, 2022, https://www.forbes.com/sites/maurybrown/2022/03/08/mlb-inks-steaming-deal-with-apple-for-exclusive-friday-night-doubleheader-games/?sh.

87 This coverage includes MLS 360, pre- and post-match coverage, club content, match replays, live and MLS NEXT Pro matches Leagues Cup and all MLS playoff games are included. MLS 360 is a "new live whip-around show on match days" which "will provide look-ins from every match and feature every goal, penalty kick, and big save, as well as analysis and discussion." MLS, "Apple and Major League Soccer Unveil Live Event Production Plan and Talent Pairings for MLS Season Pass," news release, February 15, 2023, https://www.mlssoccer.com/news/apple-and-major-league-soccer-unveil-live-event-production-plan-and-talent-pairi; "What is MLS NEXT Pro?" MLS NEXT Pro, accessed July 2, 2024, https://www.mlsnextpro.com/about/ (MLS NEXT Pro is the third-tier league of the MLS that "completes the pro player pathway from MLS NEXT to MLS first teams."); "MLS Season Pass Is Now Available Worldwide on the Apple TV App," *LAFC*, February 1, 2023, https://www.lafc.com/news/mls-season-pass-is-now-available-worldwide-on-the-apple-tv-app.

88 "Incredible Players. Higher Stakes. Messi's First Full MLS Season. All on Apple TV. Now 25% Off the Full Season Price," MLS, accessed July 2, 2024, https://www.mlssoccer.com/season-pass/.

89 Joe Reedy, "Apple Embraces Potential of Sports Streaming with MLS Deal," *Associated Press*, February 1, 2023, https://apnews.com/article/mlb-technology-sports-television-baseball-5f5ba756efea27be391d36e7d565bee8.

90 Associated Press, "Netflix Now Has Nearly 270 Million Subscribers After Another Strong Showing to Being 2024," *US News & World Report*, April 18, 2024, https://www.usnews.com/news/business/articles/2024-04-18/netflix-now-has-nearly-270-million-subscribers-after-another-strong-showing-to-begin-2024.

91 Alexandra Canal, "Netflix's NFL Deal Highlights Streamer's 'Natural Evolution' as Sports Rights Take Center Stage," *Yahoo Finance*, May 19, 2024, https://finance.yahoo.com/news/netflixs-nfl-deal-highlights-streamers-natural-evolution-as-sports-rights-take-center-stage-080037882.html.

92 Chris Vannini, Jason Jones, and Jenna West, "WWE's 'Raw' to Move to Netflix in 2025 in 10-Year Deal Reportedly Worth $5 Billion," *The Athletic*, January 23, 2024, https://www.nytimes.com/athletic/5221469/2024/01/23/wwe-netflix-deal-raw-2025/.

93 Todd Spangler, "Netflix Scores Two NFL Christmas Day 2024 Game Under Three-Year Deal with League," May 15, 2024, *Variety*, https://variety.com/2024/digital/news/netflix-nfl-christmas-day-2024-games-streaming-1235998673/.

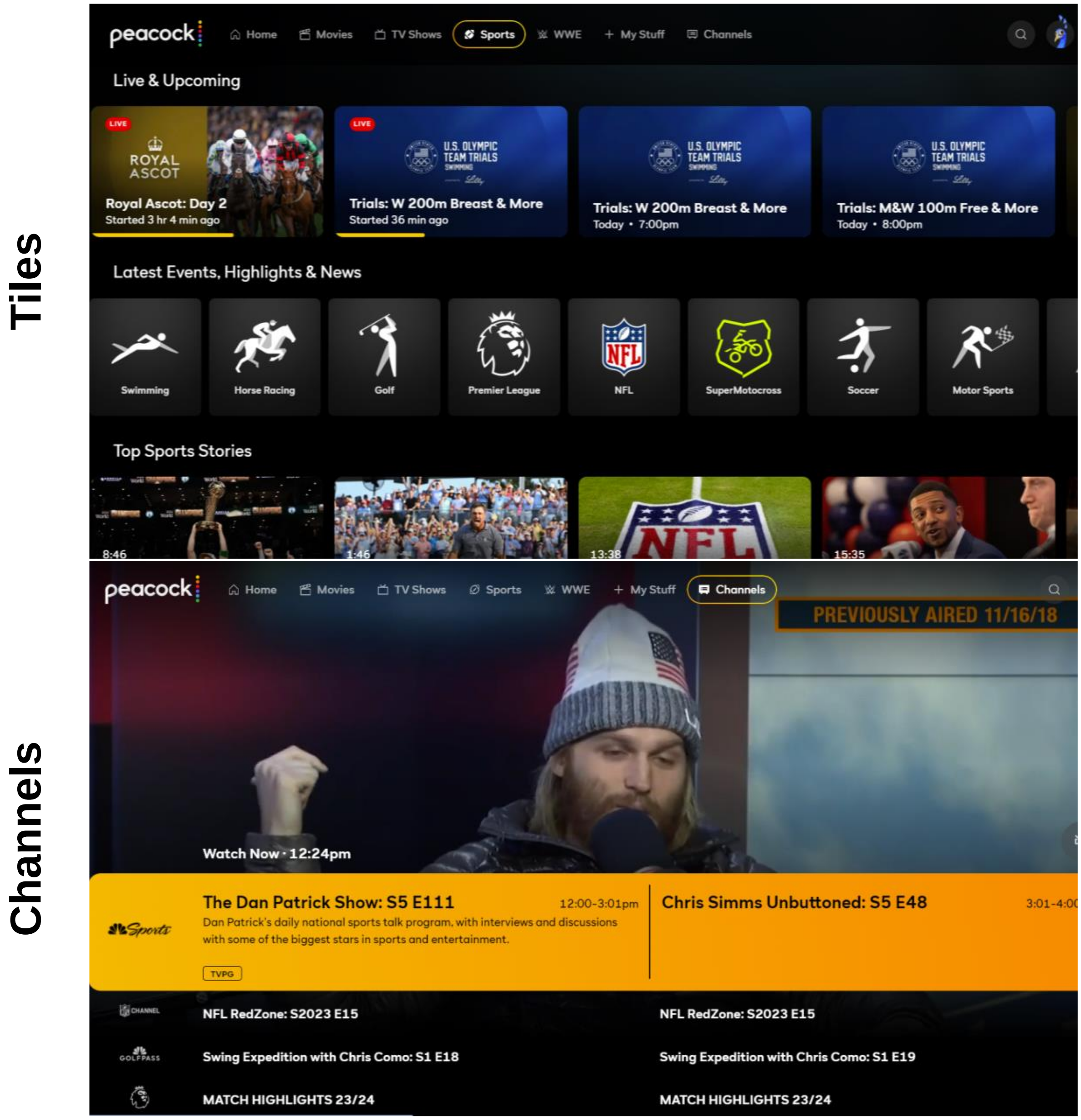
(74) These services present their content in various ways, some of which are depicted in Figure 11 and Figure 12. Peacock and Paramount+'s "Sports" tab presents users with a variety of tiles, which include live and on-demand content. Peacock's "Channels" tab offers over 50 "channels" allowing users to "stream nonstop news, sports, comedy, reality, true crime, and more."[94] Peacock offers various sports channels such as NBC Sports, Premier League TV, WWE Network, GolfPass, and more.[95] Paramount+'s "Live TV" hub offers a wide selection of channels, including various sports options.[96]

94 Peacock channels include live sports and news as well as 24/7 streams of content from NBC's library. This content is also available on-demand. These channels help subscribers "[s]croll less and stream more." Premium Plus subscribers can get their local NBC channel. "Stream TV with Peacock Channels," Peacock, accessed June 19, 2024, https://www.peacocktv.com/channels.

95 "Stream TV with Peacock Channels," Peacock, accessed June 19, 2024, https://www.peacocktv.com/channels.

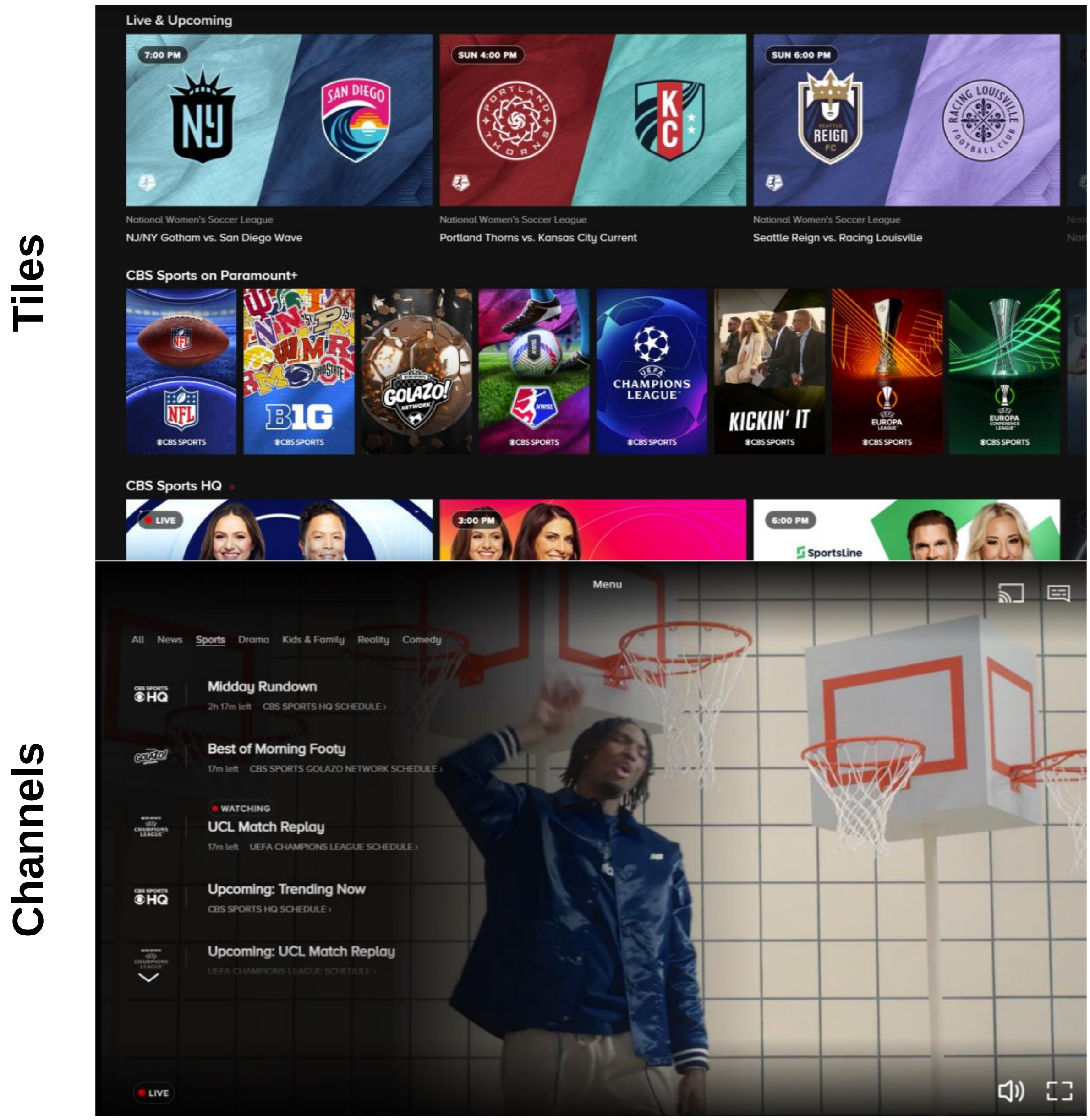
96 "The Live TV hub also features dozens of looping 'live' channels." Similar to Peacock, the content streamed on these channels is also available on-demand. Premium subscribers can stream their local CBS affiliate. Bill Frost, "Paramount+, Channels: CBS, Nickelodeon, and More," *Cable TV*, March 5, 2024, https://www.cabletv.com/paramount-plus/channels.

Figure 11. Peacock user interface



Source: Screenshots taken from the laptop interface from Peacock.

Figure 12. Paramount+ user interface



Source: Screenshots taken from the laptop interface from Paramount+.

(75) Other SVODs, such as Amazon Prime Video and Apple TV+, similarly present their content in the tile format, indicating what is live with a small "Live" icon on the tile. These services will generally offer a live and upcoming guide, similar to a what is depicted in Figure 11 and Figure 12.

II.A.4.c. DTC streaming services from sports leagues and RSNs

(76) In addition to MVPDs/vMVPDs and SVODs, viewers can access live sports through specialized sports DTC services offered by sports leagues or RSNs. I describe some services below.

- NFL+, launched in 2022, offers simulcasts of local and primetime broadcast NFL games, postseason games, and eight exclusive games broadcast by NFL Network.[97] A premium version of NFL+, NFL+ Premium, gives consumers additional access to full and condensed game replays and NFL RedZone.[98] According to S&P Global, 5% of US internet households use NFL+ and 4% use NFL+ Premium.[99]

- MLB.TV, launched in 2002, offers simulcasts of out-of-market regular season MLB games (subject to national blackouts), pregame and postgame shows for 17 out of 30 clubs, and minor league games, as well as other baseball-related content.[100] According to S&P Global, 6% of US internet households have a subscription to MLB.TV.[101] In 2023, MLB's Chief Operation and Strategy Officer, Chris Marinak, said, "We're [the MLB is] really preparing for a world where viewing is done much more on digital platforms."[102] In February 2024, MLB commissioner Rob Manfred expressed his desire to launch a streaming service for the MLB that includes in-market games. The service would be a "one-stop shop[]" for the MLB which would allow fans to "stream any game, any team, anywhere, for a reasonable price."[103] A similar product, a DTC streaming

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97 This includes all Monday, Thursday, and Sunday night games. NFL Network is the linear channel that provides "24/7 football news and coverage, plus eight exclusive live games." "Explore NFL+," NFL, accessed July 2, 2024, https://www.nfl.com/plus/learn-more; Ben Fischer, "NFL To Proceed With Launch of Streaming Service," *Sports Business Journal*, May 25, 2022, https://www.sportsbusinessjournal.com/en/Daily/Morning-Buzz/2022/05/25/NFL-Plus; "NFL Launches Exclusive Streaming Subscription Service NFL+," NFL, July 25, 2022, https://www.nfl.com/news/nfl-launches-exclusive-streaming-subscription-service-nfl.

98 NFL Redzone is a channel that provides "every touchdown from every game, every Sunday afternoon during the regular season." "Explore NFL+," NFL, accessed July 2, 2024, https://www.nfl.com/plus/learn-more.

99 See chart titled "Sports subscription services used in the US, Q3 2023." Scott Robson et al.,"Sports Report 2024," *S&P Global Market Intelligence*, April 1, 2024, https://www.capitaliq.spglobal.com/apisv3/spg-webplatform-core/news/article?id=80961673; according to Antenna, NFL+ reached two million subscribers by September 2023. "How The NFL Is Navigating The World of Streaming," *The Antenna*, accessed June 18, 2024, https://www.antenna.live/post/how-the-nfl-is-navigating-the-world-of-streaming.

100 For example, Big Inning is "MLB's whiparound show that features highlights and live look-ins every day of the season." David Adler, "How MLB.TV Became the Gold Standard for Sports Streaming," MLB, May 24, 2023, https://www.mlb.com/news/mlb-tv-growth-as-top-sports-league-streaming-service; consumers also have the option to purchase a package to watch all out-of-market games for a single team. "The Home of Streaming Baseball," MLB, accessed May 20, 2024, https://www.mlb.com/live-stream-games/subscribe.

101 See chart titled "Sports subscription services used in the US, Q3 2023." Scott Robson et al., "Sports Report 2024," *S&P Global Market Intelligence*, April 1, 2024, https://www.capitaliq.spglobal.com/apisv3/spg-webplatform-core/news/article?id=80961673.

102 David Adler, "How MLB.TV Became the Gold Standard for Sports Streaming," MLB, May 24, 2023, https://www.mlb.com/news/mlb-tv-growth-as-top-sports-league-streaming-service.

103 Phil Miller, "Rob Manfred Promotes His Desire for Streaming Broadcast Option for All Teams, Including Twins," February 15, 2024, https://www.startribune.com/twins-mlb-commissioner-rob-manfred-streaming-tv-broadcast-options/600343905.

service offering local live broadcasts for at least half the teams, is targeted for release in time for the 2025 season.[104]

- NBA League Pass is the NBA's DTC service, providing consumers simulcasts of all out-of-market regular season NBA games (that are not otherwise telecast nationally), around-the-clock NBA TV, and select postseason coverage.[105] NBA League Pass became available for streaming in 2018 through Dish Network's Sling TV and became available as a standalone DTC service at the start of the 2019–2020 season.[106] NBA League Pass saw a "50% growth in subscribers and a 48% increase in viewership" in the 2022–2023 season.[107] According to S&P Global, 4% of US internet households have a subscription to NBA League Pass.[108]
- F1 TV Pro is Formula 1's DTC service, allowing consumers to watch every F1, F2, F3, and Porsche Supercup race; replays and highlights; exclusive F1 shows; and F1 archives and documentaries.[109]
- NFL Sunday Ticket is a subscription service that allows consumers to watch "out-of-market regular season Sunday National Football League games not available on your local broadcast in your area (CBS or Fox affiliate)."[110] In 2023, Google reached a $14 billion, seven-year deal to be the exclusive distributor of the NFL's Sunday Ticket. The rights to Sunday Ticket were previously held by DirecTV since 1994. Google sells NFL Sunday Ticket as both an add-on to YouTube TV and stand-alone service.[111]

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[104] Steve McCaskill, "MLB Hopes to Launch In-Market Streaming Service in 2025," *Sports Pro Media*, February 9, 2024, https://www.sportspromedia.com/news/mlb-streaming-service-ballys-dsg-rob-manfred/.

[105] Consumers also have the option to purchase a package to watch all out-of-market games for a single team. Only select round-one playoff games are available live or on-demand. "NBA League Pass Help Center," NBA, accessed June 13, 2024, https://support.watch.nba.com/hc/en-us/articles/115000585974-NBA-League-Pass; "League Pass Blackouts," NBA, accessed June 13, 2024, https://support.watch.nba.com/hc/en-us/articles/115002481154-League-Pass-Blackouts; "NBA League Pass," NBA, accessed June 13, 2024, https://www.nba.com/watch/league-pass-stream.

[106] Erik Gruenwedel, "NBA TV Streaming Service Now Available as Standalone Product," *Media Play News*, October 18, 2022, https://www.mediaplaynews.com/tag/nba-league-pass.

[107] NBA, "NBA Delivers Record-Breaking Season Across Social and Digital Platforms," news release, April 11, 2023, https://pr.nba.com/nba-records-social-digital-2022-23-season/.

[108] See chart titled "Sports subscription services used in the US, Q3 2023." Scott Robson et al., "Sports Report 2024," *S&P Global Market Intelligence*, April 1, 2024, https://www.capitaliq.spglobal.com/apisv3/spg-webplatform-core/news/article?id=80961673.

[109] "Stream F1 Live, Your Way," F1, accessed July 2, 2024, https://www.formula1.com/en-us/subscribe-to-f1-tv#products.

[110] "The Exclusive Home of NFL Sunday Ticket – YouTube & YouTube TV," YouTube TV, accessed June 17, 2024, https://tv.youtube.com/learn/nflsundayticket/.

[111] Google does not produce the telecasts of these games; instead, Sunday Ticket telecasts regular season out-of-market Sunday afternoon games that are produced by CBS and Fox. "Watch NFL Sunday Ticket on YouTube," YouTube Help, accessed July 7, 2024, https://support.google.com/youtube/answer/13821595?hl; Mark Sweeney, "YouTube's NFL Deal Turns up the Heat in Battle for Sports Rights," *The Guardian*, December 23, 2022, https://www.theguardian.com/media/2022/dec/23/youtube-nfl-deal-turn-up-heat-battle-for-sports-rights.

- Bally Sports+ is the DTC service for Bally Sports, which operates 18 RSNs, that allows consumers in specific markets to stream live local NBA, NHL, and MLB games subject to national blackouts.[112] The service launched in 2022.[113]
- YES App is the DTC service for the YES Network, an RSN that holds exclusive regional rights to the New York Yankees, Brooklyn Nets, and New York Liberty, and allows consumers to "stream all live YES Network programming, including Yankees, Nets and pregame and postgame shows" in addition to all of YES' on-demand programming.[114] The YES App launched in 2021.[115] In January 2024, YES Network and MSG Network, another New York-area RSN that holds exclusive regional rights to the New York Knicks, New York Rangers, New York Islanders, and New Jersey Devils, announced that they are teaming up to launch a streaming JV called Gotham Advanced Media and Entertainment (GAME).[116] MSG launched its own DTC service, MSG+, in 2023.[117]

II.A.4.d. FASTs

(77) Viewers can also access live sports and other sports content for free through FAST services.[118] For instance:

- Pluto TV is a FAST service owned by Paramount that allows users to stream thousands of movies and TV shows as well as live sports and other sports-related content. Pluto TV offers users

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[112] To access the stream, subscribers must enter their zip code to determine their home market, and the subscribers first stream must take place from their home zip code. Bally Sports markets include Bally Sports Detroit, Bally Sports Florida, Bally Sports Great Lakes, Bally Sports Indiana, Bally Sports Kansas City, Bally Sports Midwest, Bally Sports New Orleans, Bally Sports North, Bally Sports Ohio, Bally Sports Oklahoma, Bally Sports San Diego, Bally Sports SoCal, Bally Sports South, Bally Sports Southeast, Bally Sports Southwest, Bally Sports Sun, Bally Sports West, and Bally Sports Wisconsin. "Bally Sports," Sinclair, accessed July 7, 2024, https://sbgi.net/sports/regional-sports-networks/.

[113] Bally Sports, "Bally Sports+ Streaming Service to Become Widely Available September 26," news release, updated August 2023, https://help.ballysports.com/Answer/Detail/000001446.

[114] "Sign Up," YES, accessed July 7, 2024, https://signup.watchyesnetwork.com/.

[115] "About the YES Network," YES, accessed July 9, 2024, https://www.yesnetwork.com/info/about.

[116] YES Network, "The YES Network and MSG Networks Form Gotham Advanced Media and Entertainment (GAME), a New Technology, Sports and Entertainment Digital Technology Streaming Joint Venture," news release, January 4, 2024, https://www.yesnetwork.com/news/the-yes-network-and-msg-networks-form-gotham-advanced-media-and-entertainment-game-a-new-technology-sports-and-entertainment-digital-technology-streaming-joint-venture.

[117] MSG Networks, "MSG+ Provides New York Area NHL & NBA Fans More Ways to Watch Their Favorite Teams as NHL and NBA Seasons Begin," news release, September 19, 2023, https://www.msgnetworks.com/msg-provides-new-york-area-nhl-nba-fans-more-ways-to-watch-their-favorite-teams-as-nhl-and-nba-seasons-begin/.

[118] Roku, "Roku Lands Exclusive Rights to Major League Baseball Sunday Leadoff," news release, May 13, 2024, https://newsroom.roku.com/news/2024/05/roku-lands-exclusive-rights-to-major-league-baseball-sunday-leadoff/tetn-dag-1715620860; Fubo, "Fubo Sports Network Now Available on Amazon Freevee," news release, November 29, 2022, https://ir.fubo.tv/news/news-details/2022/Fubo-Sports-Network-Now-Available-on-Amazon-Freevee/default.aspx.

various sports channels such as the NFL channel, CBS Sports HQ, Fox Sports, NBC Sports, MLB channel, and more.[119]

- Tubi is a FAST service owned by Fox and provides viewers with "an extensive library of live TV channels."[120] Tubi includes a number of sports channels featuring live sports and other sports content, including Fox Sports on Tubi, PGA Tour channel, MLB channel, the NHL channel, and others.[121]
- The Roku Chanel is an independent FAST service that offers viewers entertainment and sports content.[122] Earlier this year, Roku reached a multi-year deal with the MLB to exclusively stream 18 early Sunday games that are produced in collaboration with the MLB.[123]
- Freevee is a FAST service offered by Amazon that offers viewers entertainment channels as well as live sports, including soccer and MMA, and other sports content.[124]

II.A.4.e. Consumers watch live sports through a variety of avenues

(78) Consumers' preferences for viewing sports vary on several dimensions, including the amount of sports they watch, the particular sports they watch, and, even within a particular sport, whether they prefer, say, local broadcasts of the "home team" or national broadcasts of marquee teams. A household's aggregation of the preferences of its members can yield an even wider range of possibilities.[125]

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[119] "About Pluto TV," Pluto TV, accessed June 28, 2024, https://www.paramountpressexpress.com/pluto-tv/page/about-pluto-tv; "Sports," Paramount, accessed June 28, 2024, https://www.paramountpressexpress.com/pluto-tv/page/sports.

[120] "About Us," Tubi, accessed June 28, 2024, https://corporate.tubitv.com/; "Complete Guide: Live Channels on Tubi – US," Tubi, accessed June 28, 2024, https://tubitv.com/help-center/Content/articles/24898743777435.

[121] "Complete Guide: Live Channels on Tubi – US," Tubi, accessed June 28, 2024, https://tubitv.com/help-center/Content/articles/24898743777435.

[122] "Your Home for Free and Premium TV," Roku, accessed June 28, 2024, https://www.roku.com/whats-on/the-roku-channel.

[123] Roku, "Roku Lands Exclusive Rights to Major League Baseball Sunday Leadoff," news release, May 13, 2024, https://newsroom.roku.com/news/2024/05/roku-lands-exclusive-rights-to-major-league-baseball-sunday-leadoff/tetn-dag-1715620860.

[124] Christian de Looper, "Amazon Freevee: Everything You Need to Know About the Free Streaming Service," Amazon, June 26, 2023, https://www.aboutamazon.com/news/entertainment/what-is-amazon-freevee; Fubo, "Fubo Sports Network Now Available on Amazon Freevee," news release, November 29, 2022, https://ir.fubo.tv/news/news-details/2022/Fubo-Sports-Network-Now-Available-on-Amazon-Freevee/default.aspx.

[125] Economic literature analyzing the demand for (v)MVPD subscriptions often recognizes the diversity in consumer preferences. *See e.g*., Gregory S. Crawford et al., "The Welfare Effects of Vertical Integration in Multichannel Television Markets," *Econometrica* 86, no. 3 (May 2018): 924–925 ("[Analysis results] indicate consumers have substantial heterogeneity in their valuation for satellite bundles... [S]uch heterogeneity assists the model in matching observed Comcast, DirecTV, and Dish [profits]."); Gregory S. Crawford and Ali Yurukoglu, "The Welfare Effects of Bundling in Multichannel Television Markets," *American Economic Review* 102, no. 2 (April 2012): 644, 654 ("We estimate consumer preferences using both individual-level and market-level data on viewership, i.e., which channels consumers watch and for how long, and market-level data on bundle purchases, i.e., which bundles of channels consumers purchase, what channels they contain, and what prices are charged… The industry model predicts household demand for multichannel television services, household viewership of channels, prices and bundles offered by distributors, and distributor channel-specific input costs").

(79) As discussed above, there are many ways that a household can find content that matches its sports viewing preferences, including MVPDs and vMVPDs as well as watching sports on SVODs or DTC services. As shown in Figure 13, a wide range of sports viewing preferences can be accommodated by subscribing to SVOD and DTC services rather than, or in addition to, an MVPD or vMVPD.

Figure 13. Summary of alternatives to MVPDs and vMVPDs with sports available to consumers

Service	Alternative type	Sports / leagues included	Monthly subscription price
Peacock[126]	SVOD	Football (NFL), Soccer (EPL), Golf (PGA), Olympics, and more	$5.99
Paramount+[127]	SVOD	Soccer (Champions League), Football (NFL), and more[128]	$5.99
Max with B/R sports add-on[129]	SVOD	Basketball (NBA and March Madness), Baseball (MLB), Soccer (select US National team games), and more	$9.99
ESPN+[130]	SVOD	Soccer (La Liga, Bundesliga), Baseball (MLB), Hockey (NHL), Tennis, Golf (PGA), NCAA sports, and more	$10.99
Amazon Prime Video[131]	SVOD	Football (NFL), Basketball (WNBA), Baseball* (MLB), Basketball* (NBA), Hockey* (NHL), and more	$14.99
Apple TV+[132]	SVOD	Baseball (MLB), Soccer (MLS) with MLS Season Pass[133]	$9.99 for Apple TV+ $12.99 / $14.99 (Apple TV+ subscribers / standalone) for MLS Season Pass
Netflix[134]	SVOD	Football[135]	$6.99
The Roku Channel[136]	FAST	Baseball (MLB)	Free
NFL+[137]	DTC streaming service	Football (NFL)	$6.99
MLB.TV[138]	DTC streaming service	Baseball (MLB)	$29.99
NBA League Pass[139]	DTC streaming service	Basketball (NBA)	$14.99
F1 TV Pro[140]	DTC streaming service	Formula 1	$10.99
NFL Sunday Ticket[141] on YouTube TV	DTC streaming service	Football (NFL)	$349 / $449 per year (YouTube TV subscribers / standalone)
Bally Sports+[142]	DTC streaming service	Basketball (NBA), Baseball (MLB), Hockey (NHL)	$19.99
YES App[143]	DTC streaming service	New York Yankees (MLB), New York Liberty (WNBA), Brooklyn Nets (NBA), and more	$24.99

Note: A * indicates that the sport is available subject to the viewer's geographical location.

126 "Your Go-To for Hit Movies, TV, Live Sports & More," Peacock, accessed May 21, 2024, https://www.peacocktv.com/.

127 "Pick Your Plan," Paramount, accessed July 2, 2024, https://www.paramountplus.com/.

128 Users get additional access to the PGA Tour, Big 10 Football, and March Madness if they upgrade to Paramount+ with SHOWTIME. "Pick Your Plan," Paramount, accessed July 2, 2024, https://www.paramountplus.com/.

129 The B/R sports add-on is offered to Max subscribers at no extra cost, currently. "Find Your Perfect Plan," Max, accessed July 2, 2024, https://www.max.com/.

130 "Stream Live Sports and ESPN+ Originals," ESPN, accessed July 2, 2024, https://plus.espn.com/.

131 "Sports," Amazon, accessed June 27, 2024, https://www.amazon.com/gp/video/sports; Christian de Looper, "How to Watch New York Yankees Games on Prime Video," *Amazon*, updated June 25, 2024, https://www.aboutamazon.com/news/entertainment/how-to-watch-yankees-game-on-prime-video.

(80) The proliferation of alternatives to MVPDs and vMVPDs, fueled in part by the splitting of sports rights across multiple programmers and the entry of new direct buyers of sports rights, has changed the way consumers watch sports, with most sports viewers now watching sports through a variety of services. For instance, a June 2023 Fox presentation titled "Determining Consumer Demand for Specific DTC Sports Streaming Services," reports that [redacted][144]

(81) The same consumer research survey concluded that [redacted]

[132] "Apple TV+," Apple, accessed July 2, 2024, https://www.apple.com/apple-tv-plus/.

[133] "Incredible Players Higher Stakes. Messi's First Full MLS Season. All on Apple TV. Now 25% Off the Full Season Price," MLS, accessed July 2, 2024, https://www.mlssoccer.com/season-pass/.

[134] "Unlimited Movies, TV Shows, and More," Netflix, accessed July 2, 2024, https://www.netflix.com/.

[135] Nicole Sperling, "Netflix and the NFL Sign a Three-Season Deal," *The New York Times*, May 15, 2024, https://www.nytimes.com/2024/05/15/business/media/netflix-nfl-live.html.

[136] "MLB Sunday Leadoff on Roku," MLB, accessed July 2, 2024, https://www.mlb.com/live-stream-games/help-center/subscription-access-mlb-on-the-roku-channel.

[137] "Explore NFL+," NFL, accessed May 20, 2024,. https://www.nfl.com/plus/learn-more.

[138] "New Low Yearly Price," MLB, accessed May 20, 2024, https://www.mlb.com/live-stream-games/subscribe.

[139] "Unlock More Ways to Watch with League Pass," NBA, accessed May 20, 2024, https://www.nba.com/league-pass.

[140] "Stream F1 Live, Your Way," F1, accessed July 2, 2024, https://www.formula1.com/en-us/subscribe-to-f1-tv.

[141] YouTube TV is the exclusive home of Sunday Ticket. "Every Game, Every Sunday," YouTube, accessed July 2, 2024, https://tv.youtube.com/learn/nflsundayticket/.

[142] Entered zip codes for Kansas City (64030) for Bally Sports Kansas City, Detroit (48127) for Bally Sports Detroit, and San Diego (91911) for Bally Sports West and Bally Sports SoCal to view prices. "Stream Your Local Teams, Subscribe Today," Bally Sports, accessed July 7, 2024, https://www.ballysports.com/packages.

[143] "Sign Up," YES, accessed July 7, 2024, https://signup.watchyesnetwork.com/.

[144] FOX-045899, at -920.

[redacted]

II.A.4.f. Competition among distributors is vigorous

(82) The transformation of video content distribution in recent years has led to substantial entry, and vigorous competition. MVPDs, which historically had significant local market power over video content distribution, have been losing substantial subscribers to vMVPDs, for which there are much lower entry barriers.[145] vMVPDs, for their part, have collectively increased their subscribership, but

[145] See Figure 8 above. Kym Nator et al., "Leading US Video Provider Rankings, Q1 2024," S&P Global, June 6, 2024, https://www.capitaliq.spglobal.com/apisv3/spg-webplatform-core/news/article?id=81857114&redirected ("While some homes cutting the traditional pay TV cord are opting for a virtual multichannel package instead, others are dropping out of the multichannel universe entirely and satisfying their video entertainment needs through various combinations of over-the-air viewing, SVOD services and free video offerings."); as I discuss in Section II.A.4.a, entry into providing vMVPD services is easier than entry into traditional MVPD provision because a vMVPD does not need to provide a dedicated cable or fiberoptic line into a consumer's home, or satellite infrastructure.

have not been able to achieve consistent profits.[146] SVOD subscribership has been increasing even more quickly in recent years, but SVOD services, too, have struggled to earn a profit.[147]

II.B. The JV, Venu Sports

(83) On February 6, 2024, ESPN, Fox, and Warner Bros. Discovery announced that the three companies had reached an agreement to form a new JV which would distribute sports-specific content from each of the three programmers' linear networks in addition to select on-demand content.[148] The new service, called Venu Sports, will include some content from the four major professional sports leagues in the United States (NFL, NBA, MLB, and NHL), in addition to many college sports.[149] The three JV members plan to launch Venu in Fall 2024.[150]

(84) The JV will create a product that is differentiated from the current slate of sports viewing options.[151] Most notably, it will only feature the three JV members' linear networks and digital services that

[146] FOX-057328 at -340 [redacted] while Alphabet does not report YouTube TV's financial performance, MoffettNathanson, a Wall Street research company, estimates that YouTube TV lost $300 million in 2023 but projects that YouTube TV will achieve profitability in 2024, seven years after its launch in 2017. Brad Adgate, "YouTube TV is Forecasted to Be The Largest Pay-TV Distributor In 2026," *Forbes*, April 7, 2024, https://www.forbes.com/sites/bradadgate/2024/04/07/youtube-tv-is-forecast-to-be-the-largest-pay-tv-distributor-in-2026; Fubo's overall operating margin has been negative from 2019–2023 based on its reporting of operating loss and revenueFubo, *Form 10-K*, April 26, 2024, 58, 61; Fubo, *Form 10-K*, April 27, 2022, 47; Fubo, *Form 10-K*, May 29, 2020, F-4. Jon Lafayette, "Fast-Growing YouTube TV Seen Breaking Even in 2024," *Broadcasting+Cable*, March 28, 2024, https://www.nexttv.com/news/fast-growing-youtube-tv-seen-breaking-even-in-2024 (vMVPDs have "faced a profit squeeze as they try to price their services lower than cable, but still have [to] pay carriage fees at least as high as cable's.").

[147] See Figure 8 above. For example, Peacock has been unprofitable since its launch in 2020. According to Comcast's 2023 and 2021 10-Ks, Peacock's operating costs and expenses far exceeded revenue in each year 2020–2023. Comcast, *Form 10-K*, January 31, 2024, 33 ("Peacock generated revenue and costs and expenses of $3.4 billion and $6.1 billion in 2023, respectively, compared to $2.1 billion and $4.6 billion in 2022, respectively."); Comcast, *Form 10-K*, February 2, 2022, 35 ("Media segment results include the operations of Peacock, which in 2021 generated revenue of $778 million and operating costs and expenses of $2.5 billion, compared to revenue of $118 million and operating costs and expenses of $781 million in 2020."); as another example, analysts estimate that Apple TV+ will lose billions of dollars in the next few years on its streaming service. Eric J. Savitz, "An Analyst's Deep Dive into Apple TV+ Estimates Strong Growth, But Big Losses," *Barron's*, May 10, 2023, https://www.barrons.com/articles/apple-stock-price-tv-plus-earnings-34b3f10b; Netflix is an exception, as a first mover that has moved in original content. Netflix, *Form 10-K*, January 26, 2024, 21; Updated Trautman Declaration, ¶ 37 ("Nevertheless, while programmers generate substantial streaming VOD revenue, streaming VOD has to date not resulted in strong profitability (and in many instances remains unprofitable). This outcome is attributable in part to the strong streaming VOD competitive positions established by competitors Netflix and Amazon Prime Video, as well as the very large programming investments made by these two competitors.").

[148] The Walt Disney Company, "ESPN, Fox and Warner Bros. Discovery Forming Joint Venture to Launch Streaming Sports Service in the U.S," news release, February 6, 2024, https://thewaltdisneycompany.com/espn-fox-warner-bros-discovery-streaming-sports-service/.

[149] The Walt Disney Company, "ESPN, Fox and Warner Bros. Discovery Forming Joint Venture to Launch Streaming Sports Service in the U.S," news release, February 6, 2024, https://thewaltdisneycompany.com/espn-fox-warner-bros-discovery-streaming-sports-service; Warner Bros. Discovery, "Venu Sports Introduced as Name for Forthcoming Sports Streaming Service," news release, May 16, 2024, https://press.wbd.com/us/media-release/VenuSports.

[150] Warner Bros. Discovery, "Venu Sports Introduced as Name for Forthcoming Sports Streaming Service," news release, May 16, 2024, https://press.wbd.com/us/media-release/VenuSports.

[151] TWDC_FUBO_00037556, at -557 [redacted]

include sports content.[152] The JV's comparatively smaller set of included networks will mean lower affiliate fees than vMVPDs and MVPDs, and those lower costs are expected to be passed on to consumers through lower monthly subscription prices than traditional vMVPD and MVPD packages.[153] In contemporaneous business documents, the JV members have indicated that they will target potential customers outside of the traditional vMVPD and MVPD ecosystem.[154]

(85) Though the JV is focused on sports, it lacks significant sports programming that is included in many broader vMVPD and MVPD bundles, such as significant NFL national programming (from NBC, CBS, and Amazon), and substantial local NBA, MLB, and NHL programming (from RSNs). The JV does not offer a complete set of televised games for any of the four major sports leagues.[155]

(86) In this section, I describe the content included in the JV, key characteristics of the JV according to its initial term sheet, and I discuss its impact on the distribution of live sports.

II.B.1. Content

(87) Disney, Fox, and WBD will each license their networks containing live sports content to the JV.[156] These networks are summarized in Figure 15.

[redacted]

152 There are general entertainment networks that contain sports as part of the JV. D. Fox Deposition, 219:21–220:14.

153 Ordinary course documents from JV members indicate that Raptor will have a monthly price of about [redacted] FOX-057328, at -342; TWDC_FUBO_123237, at -240; TWDC_FUBO_00123245, at -249–250; WBD-00023204, at -213–214.

154 FOX-057328, at -331; *see also* FOX-057328, at -340, -346, -348; WBD-00023279, at -285.

155 Mike Reynolds, "Why FuboTV Called Foul on Media Companies' Sports Streaming Venture," *S&P Global*, February 22, 2024, https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/why-fubotv-called-foul-on-media-companies-sports-streaming-venture-80539560 ("Sports fans looking for national coverage of the Big 4 sports in North America — NFL, MLB, NBA, and NHL — alongside college football and basketball will not find all the games on either the conglomerates' joint venture or FuboTV. The proposed JV's announced package excludes NFL coverage on Sunday afternoons from CBS and 'Sunday Night Football' from NBC. Fans also need an Amazon subscription to stream Prime Video's 'Thursday Night Football' package. Paramount Global's CBS is co-rights holder with WBD of the men's version of the March Madness basketball tournament, but the broadcast network's coverage would not be available through the JV. CBS also airs Big 10 college football and basketball, as well as golf and soccer. NBC Sports' lineup extends to Big 10 college football and basketball, plus NASCAR and Indy Car motor racing; Premier League Soccer; golf and the Olympics. Fubo's US sports programming gaps include men's March Madness coverage; TNT's NBA and NHL regular-season and playoff coverage; TBS's MLB game of the week and post-season coverage. WBD's sports offering also extends to US men's and women's national soccer teams.").

156 The JV does not include Spanish language sports networks (ESPN Deportes or Fox Deportes).

[redacted]

(88) In addition to the linear networks included in the table, the JV will also give subscribers access to ESPN+, SEC Network+, ACC Network Extra, [redacted][158]

(89) While each of the linear networks included in the JV's service show sports, there is wide variation in the share of programming that is live sports across these channels. Figure 16 shows the share of programming hours that is sports events, other sports content, and non-sports content across each JV

[157] Alex Sherman, "The NBA is Picking its TV Partners—and a Deal Hinges on Warner Bros. Discovery's Next Move," *CNBC*, May 16, 2024, https://www.cnbc.com/2024/05/16/nba-tv-rights-deal-hinges-on-warner-bros-discovery.html.

[158] SEC Network+ refers to content complementary to SEC Network, the SEC's linear TV network. SEC Network+ must be accessed through the ESPN app but is available at no additional cost through TV provider credentials. "About SEC Network/SEC Network+," SEC, May 18, 2022, https://www.secsports.com/news/2022/05/about-sec-networksec-network-1; ACC Network Extra refers to select linear ACC Network content available through the ESPN app at no additional cost to one's pay TV subscription that includes the ACC Network or ACC Network Extra. "ACC Network Frequently Asked Questions," ACC, September 04, 2019, https://theacc.com/news/2019/3/11/general-acc-network-frequently-asked-questions.aspx; The Venu term sheet notes that [redacted] TWDC_FUBO_00079295, at -318; ESPN Flagship refers to ESPN's upcoming DTC service expected to launch in 2025. The service will feature all of ESPN's programming, making it a more expansive offering than ESPN+. Alex Sherman, "ESPN Will Launch Its Own Streaming Service in Fall 2025, Alongside Joint Venture." *CNBC*, February 7 2024, https://www.cnbc.com/2024/02/07/espn-will-launch-its-flagship-direct-to-consumer-service-in-fall-2025.html.

member's networks included in the JV. Disney's ABC, the Fox broadcasting network, and WBD's networks telecast a variety of content other than live sports. Figure 61 in Appendix C shows the share of programming hours that is sports events, other sports content, and non-sports content for each JV member's networks included in the JV.

[redacted]

(90) At launch, the JV service will be available as a standalone platform/app.[159] None of the JV's linear networks nor its digital services are to be distributed on an exclusive basis to the JV.[160]

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159 TWDC_FUBO_00079295, at -299.

160 TWDC_FUBO_00079295, at -295. The Venu binding term sheet describes a non-compete agreement [redacted] The term sheet states that this non-compete lasts

II.B.2. Characteristics of the JV agreement

(91) While the terms of the JV have not been finalized, the terms have been under negotiation since the decision was made to proceed with a three-way JV and are now memorialized in a binding term sheet that I understand the parties have increasingly relied upon as they near closure of the deal. My description of the characteristics of the agreement below is based on the parties' binding term sheet.

II.B.2.a. Duration

(92) The JV's initial term is [redacted] The initial term is structured as [redacted][161] Starting at [redacted] post-launch of the JV, [redacted][162] Furthermore, [redacted][163]

II.B.2.b. Financial terms

(93) [redacted][164] [redacted][165] [redacted]

[redacted] *See also* TWDC_FUBO_00079295, at -311.

161 TWDC_FUBO_00079295, at -301.

162 TWDC_FUBO_00079295, at -301 [redacted]

163 TWDC_FUBO_00079295, at -298–299.

164 TWDC_FUBO_00079295, at -301–302.

165 [redacted] TWDC_FUBO_00083884, at -887; D. Fox Deposition, 190:7–191:1 [redacted] *See also* Warbrooke Deposition, 210:13–21 [redacted]

[redacted][166]

(94) [redacted][167] [redacted][168] [redacted][169]

II.B.2.c. Management of the JV

(95) [redacted][170] [redacted][171] [redacted][172]

[redacted] *See also* Pitaro Deposition, 128:1–8 [redacted]

166 TWDC_FUBO_00079295, at -302.

167 TWDC_FUBO_00079295, at -300.

168 In a September 21, 2023 email, James Pitaro, Chairman of ESPN, wrote that [redacted] TWDC_FUBO_00104131 at -132; *See also* WBD-00021826 at -826, a September 26, 2023 email from Luis Silberwasser, Chairman and CEO of WBD Sports, to executives at WBD [redacted]; These documents are consistent with JV member financial models that show [redacted] *See, e.g.,* TWDC_FUBO_00123219, at -223; WBD-00023204, at -207.

169 [redacted] WBD-00023204, at -207; TWDC_FUBO_00123219, -at 223; FOX-057328, -at 343.

170 TWDC_FUBO_00079295 at -305.

171 TWDC_FUBO_00079295 at -305. *See* e.g., Campbell Deposition, 371:8–13 [redacted]; D. Fox Deposition, 228:18–230:4 [redacted] Pitaro Deposition, 161:13–21 [redacted]

172 TWDC_FUBO_00079295 at -305.

II.B.2.d. No sharing of information or coordination outside the JV

(96) [redacted][173] [redacted][174] [redacted][175]

(97) [redacted][176] [redacted][177] [redacted]

[173] Venu's Firewall Policy for Third Party Competitively Sensitive Information outlines [redacted] FOX-065060, at -060. *See also* Warbrooke Deposition, 97:14–98:13 [redacted] Campbell Deposition, 304:7–305:8 [redacted] D. Fox Deposition, 127:16–20 [redacted] FOX-064837 [redacted]

[174] TWDC_FUBO_00079295 at -302.

[175] TWDC_FUBO_00079295 at -302.

[176] TWDC_FUBO_00079295 at -297 [redacted] D. Fox Deposition, 226:9–17 [redacted] Pitaro Deposition, 162:22–163:03 [redacted]

[177] Since October 5, 2023, the Bleacher Report Sports Add-On, which features simulcasts of WBD's sports offerings, has been available to Max subscribers. Warner Bros. Discovery, "Live Bleacher Report Sports Tier to Launch on Max in U.S. on Thursday, October 5," news release, September 19, 2023, https://press.wbd.com/us/media-release/max/live-sports-tier-launch-max-us-thursday-october-5.

II.C. The JV's impact on the industry and consumers

(98) The JV will provide consumers with a new option to view live sports and associated content, in addition to the existing MVPD, vMVPD, SVOD, and DTC options described in Section II.A.4 above. Internal analyses by the JV members indicate a desire to target "cord cutters" and "cord nevers," that is, consumers who are not subscribing to an MVPD or vMVPD service.[178] Some consumers will find the JV to be an attractive option relative to larger bundles, given its particular combination of content and price. But the JV provides neither the breadth of sports programming and non-sports programming that MVPDs and vMVPDs typically offer nor the lower priced, more narrow bundles offered by single-sport specialized DTC services.[179] Figure 17, for example, compares the share of sports event audience hours accounted for by networks included in the JV compared to the share of sports event audience hours accounted for by networks included in Fubo's Pro package, Comcast's "Popular TV" package, and YouTube TV, which offers subscribers one package.[180]

[178] In this context, "cord cutters" refers to households that have dropped their MVPD or vMVPD, and "cord nevers" are households that have never subscribed to an MVPD or vMVPD. James Pitaro, Chairman of ESPN, testified that the JV is intended to attract cord cutters and cord nevers. Pitaro Deposition, 215:3–7 [redacted] *See also* Iger Deposition, 91:1–18 [redacted] Deposition of David Espinosa Deposition"], 153:20–154:11 [redacted]

[179] For example, a Fubo document indicates that Fubo customers [redacted] FUBO_0063681, at -681 (Janedis Deposition Exhibit 12).

[180] RSNs are not included in the Nielsen viewership data. Both Comcast and Fubo carry a significant number of RSNs in their network lineups. Adding RSNs would decrease the JV's share of sports audience hours since they carry no RSNs.

[redacted]

(99) The particular content and price point offered by the JV will appeal to a certain set of consumers as an alternative to, or in addition to, their current video services.[181] [redacted][182] As

[181] Espinosa Deposition, 50:14–24 [redacted]

[182] [redacted] TWDC_FUBO_00123202 (Raptor Model), at H252, K252; FOX-024561 (Analysis), at L37,O37; WBD-00023363 (JV_P&L_Cal), at G11, J11.

a comparison, however, there are 75 million subscriptions to MVPD or vMVPD services as of Q3 2023, and 294 million subscriptions to a SVOD or ESPN+.[183]

(100) As the discussion throughout this section indicates, and I will discuss in more detail below, the JV will be only one of many ways consumers can access sports content, will appeal to only certain consumer types, and will be small relative to the rest of the video distribution ecosystem.

183 See the file "02 Subscriber trends.xlsx" in my backup.

III. Mr. Orszag fails to establish product markets that accurately reflect the competitive realities of sports broadcasting, programming, and distribution

(101) In this section, I discuss market definition generally and the relevant markets appropriate for analyzing the issues in this case. Mr. Orszag has claimed that there are (at least) four relevant markets. One is for the sale of "sports network programming" to MVPDs and vMVPDs.[184] The other three are for the sale of pay TV services to consumers by various entities: (i) pay TV services sold by MVPDs and vMVPDs, (ii) pay TV services sold by vMVPDs, and (iii) pay TV services involving "skinny sports bundles."[185]

(102) I begin in Section III.A by discussing some principles of market definition that are of importance in this case. In Section III.B, I discuss flaws in Mr. Orszag's three claimed markets for the sale of pay TV services to consumers. In Section III.C, I discuss why the impact of the JV is more usefully analyzed within a broader market for video distribution services. Finally, in Section III.D, I discuss the flaws in Mr. Orszag's claimed market for the sale of sports network programming to vMVPDs and MVPDs.

III.A. Economic principles for the analysis of market definition

(103) A central part of any antitrust analysis is the identification of the relevant markets that may be affected by the transaction and/or conduct at issue. The basic idea is to identify a set of products that could see elevated prices (or reduced quality) if competition within the set of products were reduced or eliminated. Only such a set of products could see negative effects from anticompetitive actions.

(104) As Mr. Orszag describes and endorses, a common approach to identifying relevant markets is the "hypothetical monopolist test."[186] The test asks whether a single profit-maximizing firm that was the only seller of a candidate group of products "likely would undertake at least a small but significant and non-transitory increase in price ("SSNIP") or other worsening of terms ("SSNIPT") for at least one product in the group."[187] If the answer is yes, then that candidate group of products is a relevant market.

[184] Updated Orszag Declaration, § II.B.

[185] Updated Orszag Declaration, § II.C.

[186] Updated Orszag Declaration, ¶ 27 ("Conceptually, the relevant market is defined by the 'hypothetical monopolist test.'").

[187] Updated Orszag Declaration, ¶ 27; US Department of Justice and Federal Trade Commission, *Merger Guidelines*, December 18, 2023 [hereinafter *2023 Merger Guidelines*], § 4.3.A. Mr. Orszag actually quotes the now superseded 2010 Horizontal Merger Guidelines description of the hypothetical monopolist test in which the quoted description instead

(105) Two factors are necessary for a candidate set of products to pass this test: First, the products in the candidate market must be relatively close substitutes for each other. If this is not the case, then a reduction in competition among them would not lead to any significant price increases (since competition among them would have been very limited in any case). Second, products outside of the market must be distant enough substitutes so that in the event of a price increase for a candidate product, buyers would not substitute in sufficient numbers to products outside of the candidate market to make the price increase unprofitable for the hypothetical monopolist of the candidate products. So, in short, one needs to show that the products *in* the candidate market are relatively close substitutes for each other, and the products *outside* of the candidate market are relatively distant substitutes for those in the candidate market.[188]

(106) The hypothetical monopolist test focuses on demand-side substitution in asking whether products outside the market would defeat any attempt to raise prices inside the market.[189] As such, establishing a relevant market potentially impacted by anticompetitive actions is a *necessary* condition for there to be anticompetitive harm, but it is *not sufficient*. For example, in some cases there may be a limited set of alternative products available for buyers to turn to at current prices, but because entry is relatively easy, many alternative products would become available were the products in the (demand-side defined) relevant market to increase in price. The possibility of easy entry is important in the present case. As I discussed in Section II.A.4, changes in technology have made entry into video distribution substantially easier than it had been in the past. Sports leagues are the entities that have sustainable market power in the supply chain for the sale of sports programming, and as a result of changes in distribution technology, these leagues can directly access consumers through streaming services such as ones they have already launched. I discuss this point further in Section IV when I analyze competitive effects of the JV.

(107) Also, in a rapidly changing industry such as the one at issue in this case, it is important in applying the hypothetical monopolist test to consider how the set of alternative products that buyers can substitute to is likely to evolve over time.[190] In a situation in which the number and attractiveness of alternative products is highly likely to grow rapidly, the results of a hypothetical monopolist test

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read "likely would impose at least a small but significant and non-transitory increase in price ('SSNIP') on at least one product in the market." The newer *Guidelines* explicitly recognize that exercises of market power can include mechanisms other than price (*e.g.*, a reduction in quality). Throughout this section, when I refer to the hypothetical monopolist test for defining a relevant market as considering the impact of "price increase" on demand, the same logic applies to any other worsening of the terms of trade, including a quality decrease at a given price.

[188] *2023 Merger Guidelines*, § 4.3, 40 ("The outer boundaries of a relevant product market are determined by the 'reasonable interchangeability of use or the cross elasticity of demand between the product itself and substitutes for it.'" (quoting *Brown Shoe Co. v. United States* decision, 370 U.S. 294, 325)).

[189] *2023 Merger Guidelines*, § 4.3.D.3, 46 ("Market definition focuses solely on demand substitution factors, that is, on customers' ability and willingness to substitute away from one product or location to another in response to a price increase or other worsening of terms.").

[190] *2023 Merger Guidelines*, § 4.3.B, 42 ("[I]f outcomes are likely to change absent the merger, e.g., because of innovation, entry, exit, or exogenous trends, the Agencies may use anticipated future outcomes as the benchmark.").

applied only with current products can give a misleading picture of the likely relevant markets going forward. This point is important in the present case because the availability of live sports programming, including through the leagues themselves, is growing and is likely to continue to grow regardless of whether the price of sports network programming increases. I discussed this point in Section II.C above and discuss it further in Section III.C below.

(108) Finally, there are often many possible candidate product markets in an antitrust case.[191] The aim of market definition is to be useful for the economic analysis of the issues in a case, and some of those relevant markets may be more useful than others. One reason this is true is that while market definition is an "in or out" process, the world is not like this. Products that are "out" of a relevant market may still be substitutes and their importance may indeed increase over time. Thus, it is important not to define a relevant market and then assume that nothing outside of the products in that market can matter at all to competition. Notably, Mr. Orszag defines markets that exclude important alternatives for buyers. Even if Mr. Orszag were correct that these alternatives are not now in the relevant market, he completely ignores the ways in which the growing competitive significance of alternative products or the possible entry of additional alternative products over time—especially by the sports leagues themselves—constrains the ability of the JV members (or any other programmer or seller of pay TV services) to exercise market power.

III.B. Mr. Orszag's proposed markets for the sale of pay TV services ignore important competitive constraints arising from consumer substitution to alternative video distribution services

(109) Mr. Orszag initially proposed two different markets for the sale of pay TV services to consumers: (i) pay TV services sold by vMVPDs and MVPDs and (ii) pay TV services sold by vMVPDs. He then supplemented his declaration with an additional proposed market: (iii) pay TV services involving skinny sports bundles.[192]

(110) In all three cases, Mr. Orszag ignores or improperly excludes relevant competitors that would serve as significant competitive constraints on the pricing of a hypothetical monopolist of the pay TV packages in Mr. Orszag's proposed markets. With the increasing expansion of and substitutability between consumers' various options for watching video content that I described in Section II.A.4, the markets that Mr. Orszag focuses on are improperly narrow.

[191] *See 2023 Merger Guidelines*, § 4.3, 39–40 ("The Agencies refer to the process of identifying market(s) protected by the Clayton Act as a 'market definition' exercise and the markets so defined as 'relevant antitrust markets,' or simply 'relevant markets.'").

[192] *See* Expert Declaration of Jonathan Orszag, April 7, 2024, ¶¶ 40, 46; Supplemental Expert Declaration of Jonathan Orszag, April 29, 2024, ¶¶ 1, 3, 7. In his most recent updated declaration, he discusses all three. Updated Orszag Declaration §§ II.B, II.C.

(111) Indeed, it is notable that Mr. Orszag never says exactly what the dividing line is between a vMVPD service (which he includes in his relevant markets) and alternative streaming services that also offer live TV services (including live sports) but that he excludes.[193] Moreover, and importantly, for live sports watching there is no real distinction for consumers between live sports events on a linear network and live sports provided via an SVOD or DTC service because, in either case, a live sports event must be watched when it is occurring.

III.B.1. Mr. Orszag's proposed downstream market for vMVPD/MVPD pay TV services improperly excludes new and growing competitors to traditional MVPDs and vMVPDs

(112) Mr. Orszag asserts that there is a relevant market for pay TV services that is "no broader than vMVPD[s] and MVPD[s]."[194] He attempts to support this claim in several ways. However, in doing so, Mr. Orszag fails to provide any convincing analysis (and sometimes provides no analysis at all) of important alternatives available to consumers such as SVODs and DTC services. In this section, I discuss the extensive evidence of the growing importance of alternatives to MVPDs and vMVPDs that Mr. Orszag ignores in his analysis—evidence that makes clear the importance of considering these rival distributors in any reliable economic analysis of this industry.

III.B.1.a. Alternatives to MVPDs and vMVPDs have transformed the competitive landscape for video distribution

(113) In support of his proposed market, Mr. Orszag first cites the decision in the AT&T-Time Warner merger trial, in which the court accepted a vMVPD and MVPD relevant market proposed by DOJ but denied the Government's request to block the proposed merger.[195] However, the opinion was rendered in 2018 (six years ago), and even at that time, Judge Richard Leon discussed the "dramatic changes that are transforming how consumers view video content." Indeed, Judge Leon noted that competition from SVODs impacted his assessment of the risks the merger posed, stating that he "simply cannot evaluate the Government's theories and predictions of harm, as presented by the

[193] For example, Mr. Orszag excludes services that he says are SVODs because they offer "limited linear programming" and "limited live sports programming" without ever saying what he views as the distinguishing quantities. *See* Updated Orszag Declaration, ¶ 50.

[194] Updated Orszag Declaration, ¶ 47.

[195] *See* Updated Orszag Declaration, ¶ 48; *United States v. AT&T Inc.*, 310 F. Supp. 3d, at 161, 195–196 (D.D.C. 2018), *aff'd* 916 F.3d 1029 (D.C. Cir. 2019) [hereinafter *AT&T Inc.*, 310 F. Supp. 3d] ("The Government's primary product market is the market for multichannel video distribution. Multichannel video distribution, as defined by the Government, involves the distribution of live, or 'linear,' video programming networks, as well as on-demand content, to subscribing consumers... As relevant here, the sellers in that product market are: 1) MVPDs... and 2) virtual MVPDs...") (emphasis in original); *United States*, Civil Case No. 17-2511 (RJL), at 172 ("[T]he Government's request to enjoin the proposed merger is DENIED.") (emphasis in original).

Government at trial, without factoring in the dramatic changes that are transforming how consumers view video content."[196]

(114) Changes in the downstream market have continued and even accelerated since the DOJ filed its complaint in that matter in November 2017 and Judge Leon's decision was issued in June 2018.[197] For instance, in the ensuing years, sports leagues, RSNs, and legacy programmers, among others, have launched new DTC streaming services containing sports programming, and existing SVOD services like Amazon Prime Video, Apple TV+ and Netflix have added live sports to their programming.[198]

(115) As Figure 18, Figure 19, and Figure 20 demonstrate, the competitive landscape for video content distribution, and of sports programming in particular, is now significantly different than it was at the time of that trial. The three figures show expansions of sports programming by distributors through (streaming) services other than MVPDs and vMVPDs, looking, respectively, at expansions by sports leagues or RSNs (Figure 18), traditional programmers (Figure 19), and new direct buyers of live sports content (Figure 20). In these timelines, blue boxes represent launches of DTC/SVOD services containing sports programming or the date when live sports were first introduced on an existing service. For example, NFL+ launched in 2022, and WBD launched a live sports add-on for Max in 2023. The green box represents integration of a DTC service containing sports programming by another service: ESPN+ acquired NHL Power Play in 2022. Orange boxes represent sports rights expansions or the introduction of additional sports offerings via DTC/SVOD add-ons. For example, Amazon gained exclusive rights to NFL's Thursday Night Football in 2022, and Amazon Prime Video introduced an MLB.TV add-on in 2019. Lastly, grey boxes represent anticipated events. For example, Apple TV+ is expected to acquire rights to a new FIFA tournament in 2025.[199]

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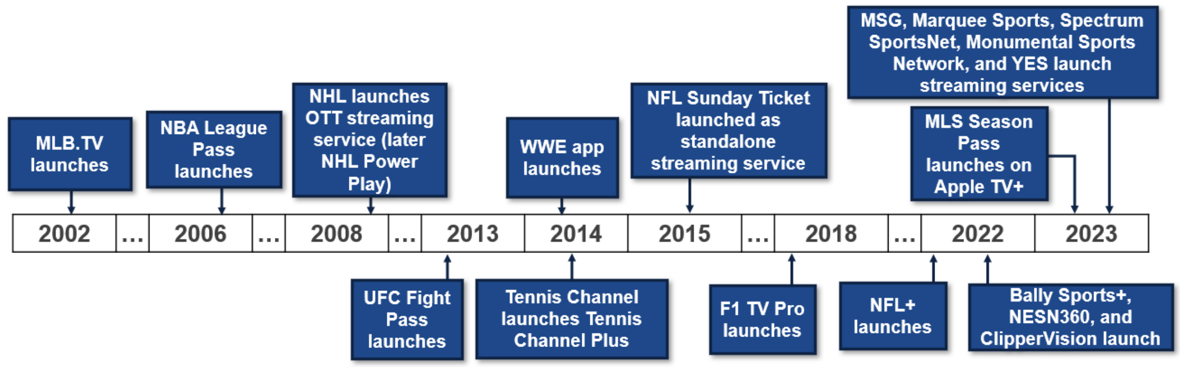
[196] *AT&T Inc.*, 310 F. Supp. 3d, at 197. Thus, while Judge Leon accepted the Government's market definition, he stated that "accepting the Government's proposed product market does not … require this Court to ignore the rising role of SVODs in the broader multichannel video programming and distribution market." *AT&T Inc.*, 310 F. Supp. 3d, at 196. It is also notable that the defendants in *AT&T* do not appear to have challenged the Government's market definition—as Judge Leon noted: "defendants, for all of their objections to the Government's case, have not meaningfully challenged the Government's proposed product and geographic markets." *AT&T Inc.*, 310 F. Supp. 3d, at 196. The Government also asserted "a broader market of 'All Video Distribution'," a market identical to the market I propose in Section II.C. *AT&T Inc.*, 310 F. Supp. 3d, at 196, n. 21.

[197] *AT&T Inc.*, 310 F. Supp. 3d, at 161, 164

[198] *See* discussion in Section II.A.4 of this report.

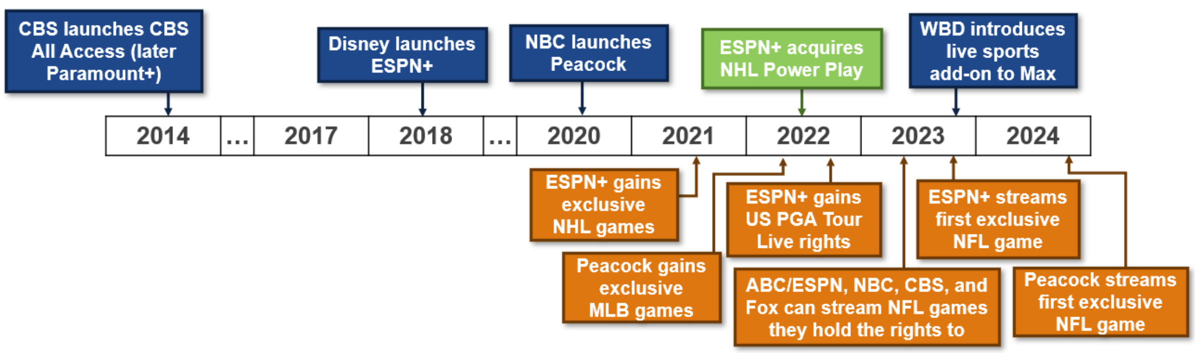
[199] Tariq Panja, "FIFA Said to Be Close to TV Deal with Apple for New Tournament," *The New York Times*, April 22, 2024, https://www.nytimes.com/2024/04/22/business/fifa-apple-tv-deal.html.

Figure 18. Sports leagues' and RSNs' increasing distribution of sports through non-(v)MVPD channels



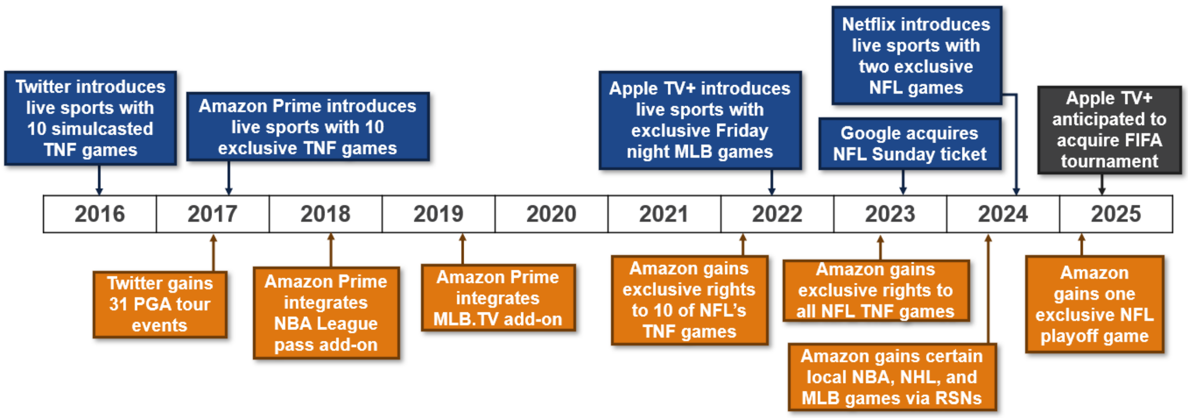
Source: Compiled from public sources, see my backup.
Note: Launches and first additions of live sports are in dark blue.

Figure 19. Programmers' increasing distribution of sports through non-(v)MVPD channels



Source: Compiled from public sources, see my backup.
Note: Launches and first additions of live sports are in dark blue, acquisitions/integrations of a product are in green, rights expansions and additional offerings are in orange. When ESPN gained the US PGA Tour Live rights, this was the first time PGA Tour Live became available in the US.

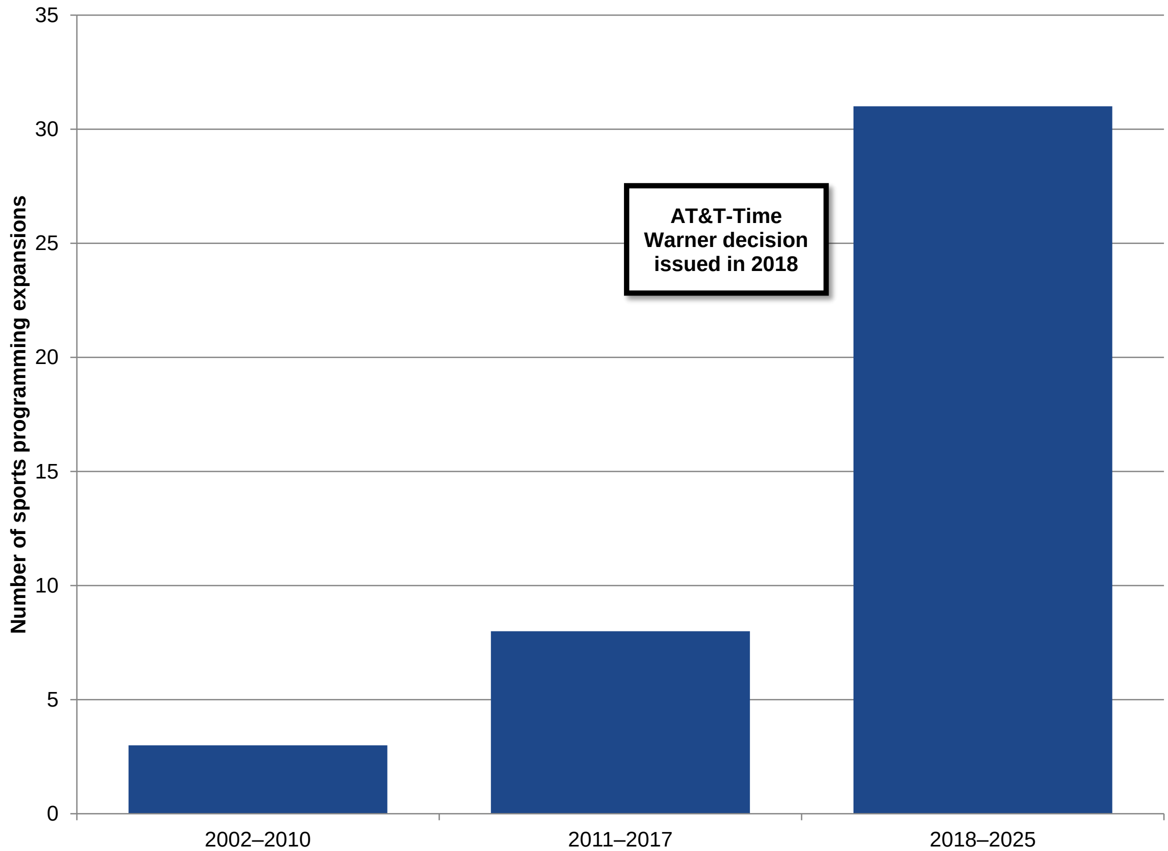
Figure 20. New direct buyers' increasing distribution of sports through non-(v)MVPD channels



Source: Compiled from public sources, see my backup.
Notes: Launches and first additions of live sports are in dark blue, rights expansions and additional offerings are in orange, and anticipated events in dark grey.

(116) Figure 21 presents counts of the events presented in the timelines above for three time periods. Since the AT&T-Time Warner decision was issued in 2018, the number of avenues for watching sports outside of MVPDs and vMVPDs has increased dramatically.

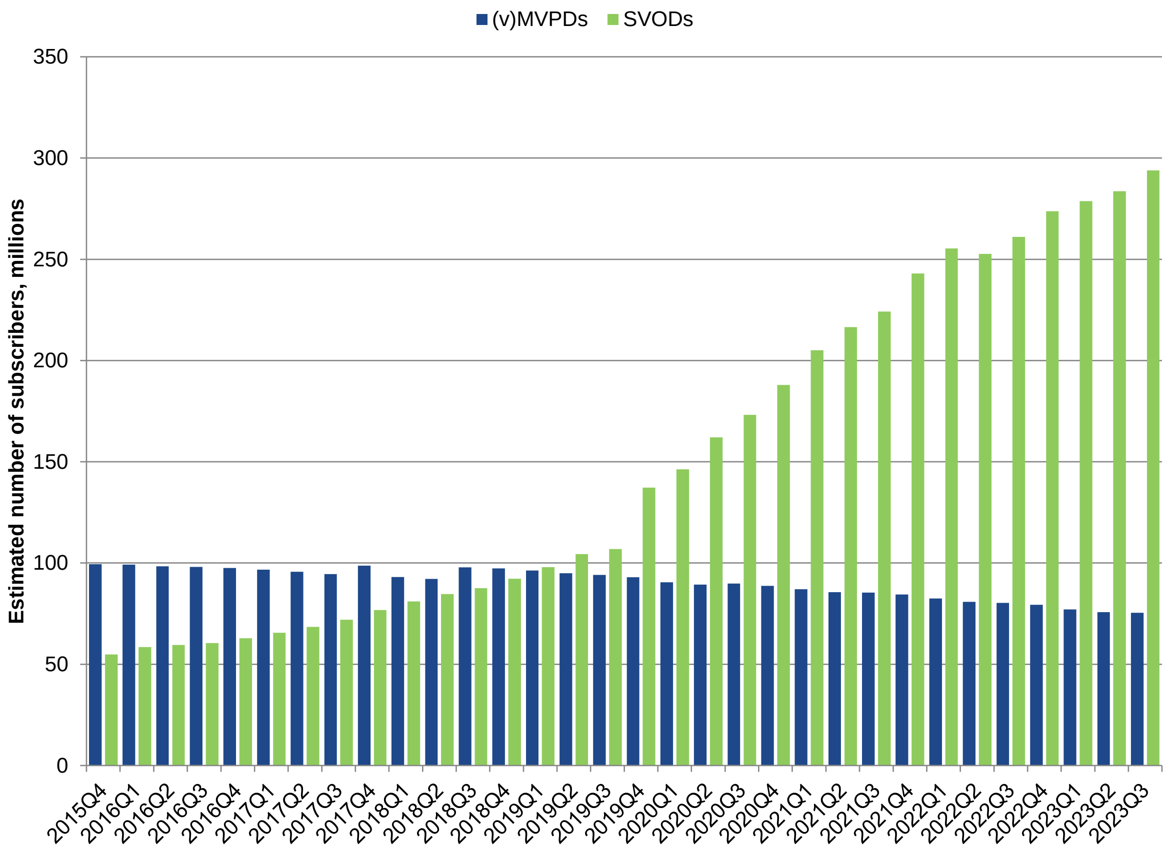
Figure 21. The availability of live sports outside of MVPDs and vMVPDs has expanded significantly in recent years



Source: Compiled from public sources, see my backup.
Notes: The one green event from Figure 19 represents the consolidation of sports programming, so it is excluded from this figure because it does not represent an incremental expansion of sports programming.

(117) At the same time that sports have increasingly been distributed outside of vMVPDs and MVPDs, the number of SVOD subscriptions has grown rapidly, in contrast to vMVPD and MVPD subscriptions, which have decreased in recent years. Figure 22 shows the number of subscribers to vMVPDs, MVPDs, and SVODs over the period 2015Q4 to 2023Q3. As Figure 22 shows, SVOD services have grown rapidly over the period relative to vMVPDs and MVPDs.

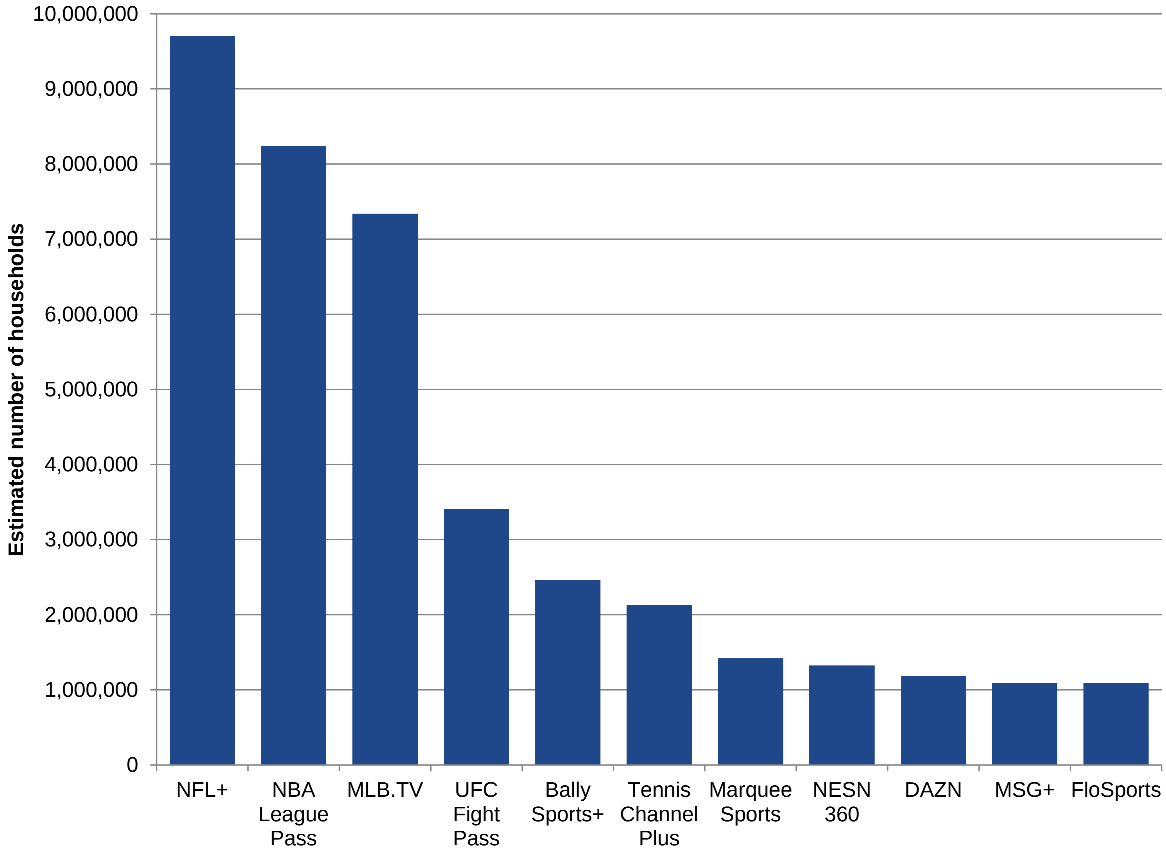
Figure 22. Aggregated subscribers to SVOD services have grown rapidly while subscribers to traditional MVPDs and vMVPDs have declined



Source: S&P Global Market Intelligence, "US multichannel video market share trends Q1 2021," Capital IQ Pro, accessed July 2, 2024; S&P Global Market Intelligence, "US multichannel video market share trends Q2 2019," Capital IQ Pro, accessed July 2, 2024; S&P Global Market Intelligence, "US multichannel video market share trends Q3 2023," Capital IQ Pro, accessed July 2, 2024; S&P Global Market Intelligence, "US multichannel video market share trends Q4 2017," Capital IQ Pro, accessed July 2, 2024.

(118) Moreover, consumers frequently view sports content through specialized sports DTC services. Figure 23 shows the estimated number of U.S. internet households that report using specialized sports DTC services. By the third quarter of 2023, millions of households obtained content from a variety of different services.

Figure 23. Estimated households that use specialized sports DTC services, third quarter of 2023



Source: S&P Global Market Intelligence, “Sports viewer crosstab, Q3 2023,” Capital IQ Pro, accessed July 3, 2024; U.S. Census Bureau, "Presence and Types of Internet Subscriptions in Household," 2022. American Community Survey, ACS 1-Year Estimates Detailed Tables, Table B28002, 2022, accessed June 27, 2024, https://data.census.gov/table/ACSDT1Y2022.B28002?q=B28002.
Notes: Answers to "Which of the following do you or someone in your household use" among a sample of 2,500 households and 1,886 sports viewing households (sports viewing households indicated that they viewed sports in their households). Figure reflects these survey results scaled up to number of US internet households. NFL+ estimated users include estimated users for both NFL+ and NFL+ Premium. NBA League Pass estimated users include estimated users for both NBA League Pass and NBA Team Pass. Tennis Channel Plus is an online streaming service with exclusive access to live matches from tournaments. Marquee Sports is an online streaming service focused on Chicago sports, primarily on the Chicago Cubs, with live coverage and original content. NESN 360 is an online streaming service for New England residents to watch Boston professional and college sports and extensive pregame and postgame coverage. DAZN is an online streaming service primarily focused on fights and crossover boxing. MSG+ is an online streaming service focused on the New York/New Jersey area. FloSports is an online streaming service focused on smaller sports such as racing, wrestling, track and field, and more. “9 Ways to Watch Tennis Channel Without Cable,” Cord Cutting Report, accessed June 27, 2024, https://cordcuttingreport.com/2023/05/15/watch-tennis-channel-without-cable/; “About Marquee Sports Network,” Marquee Sports Network, accessed June 27, 2024, https://www.marqueesportsnetwork.com/about/; “What is NESN 360?,” NESN, accessed June 26, 2024, https://support.nesn.com/hc/en-us/articles/5873136619035-What-Is-NESN-360; “Welcome,” DAZN, accessed June 27, 2024, https://www.dazn.com/en-US/welcome; “Support,” MSG+, accessed June 27, 2024, https://support.msgplus.tv/; “Signup,” FloSports, accessed June 27, 2024, https://www.flosports.tv/.

(119) Fubo board presentations and deposition testimony from Fubo executives are consistent with [redacted] For example:

- A July 2023 board meeting presentation slide (shown in Figure 24) titled [redacted][200]

[redacted]

[redacted]

- The same July 2023 board meeting presentation also contains a slide titled [redacted][201]
- A Fubo document titled "Offsite Pre-Read: What's Next?" states that [redacted]

[200] FUBO_0099661, at -681.

[201] FUBO_0099661, at -684. Notably, in the same document, [redacted] This is one of the benefits that the JV provides, as I discuss in Section V.

[redacted][202] The same document goes on to state [redacted][203]

- A Fubo presentation titled "Direct Sports Rights Strategic Context and Approach" notes that [redacted][204]
- Alberto Horihuela, Fubo's COO, testified, [redacted][205]

III.B.1.b. Mr. Orszag improperly dismisses competition from SVOD and DTC services

(120) Despite this substantial shift, Mr. Orszag improperly dismisses the competition provided by SVODs and provides no analysis whatsoever of the competitive constraints that sports-centric DTC streaming services provide to MVPDs and vMVPDs.[206]

(121) Mr. Orszag argues that SVODs are properly excluded from his downstream market because "they have significantly different product characteristics and price points."[207] The "significantly different product characteristics and price points" that he cites are that some SVODs do not provide linear programming, that some SVODs purportedly have "limited" live sports programming, and that SVODs have lower prices.[208]

(122) The assertion that a lack of linear programming on SVODs is an important differentiating factor is somewhat curious given Mr. Orszag's emphasis on the critical importance of live sports events for

202 FUBO_0097919, at -919.

203 FUBO_0097919, at -924.

204 FUBO_0011001, at -004. CBS All Access was renamed to Paramount+. EPL refers to the English Premier League.

205 Deposition of Alberto Horihuela [hereinafter "Horihuela Deposition"], 152:10–15.

206 Mr. Orszag never defines what an SVOD is, and just gives examples such as Amazon Prime Video, Netflix, and Hulu. *See* Updated Orszag Declaration, ¶ 11 ("In addition to MVPDs and vMVPDs, there are firms that offer streaming video-on-demand ("SVOD") services such as Netflix, Amazon Prime Video, and Hulu."). It is thus unclear whether he considers Peacock and Paramount+, each of which contains substantial live sports programming, from NBC and CBS, respectively, to be SVODs, or something else. If the former, then his characterization of SVODs as having "limited live sports programming" (Updated Orszag Declaration, ¶ 50) is clearly erroneous as applied to Peacock and Paramount+, which each show substantial live sports from two major sports programmers. If the latter, then he completely ignores two substantial services by which consumers can access live sports as an alternative to MVPDs and vMVPDs.

207 Updated Orszag Declaration, ¶ 49 ("It is likely that providers of SVOD services are not in the relevant market for vMVPD/MVPD services, because they have significantly different product characteristics and price points.").

208 Updated Orszag Declaration, ¶¶ 50–51.

consumers' subscription choices: since live sports must be watched when they occur, it is irrelevant whether they are shown on a linear network, SVOD, or DTC streaming service.

(123) Moreover, even if it is true that SVODs differ in some ways from vMVPDs and MVPDs, the relevant question for competition analysis is whether the SVODs or DTC services that Mr. Orszag ignores collectively provide consumers with viable alternatives to vMVPDs and MVPDs (either as standalone choices or in collections of several such services) that would constrain a hypothetical monopolist of (v)MVPDs.

(124) Importantly, because sports and non-sports content is currently spread across various available packages, consumers now regularly subscribe to multiple packages of content to achieve their desired collection of programming. Consumers can subscribe to a combination of video distribution services to obtain their desired programming, whether it is sports, non-sports, or a balance between the two. Mr. Orszag's failure to recognize this fact is a critical failure in his argument.

(125) Indeed, consumers often *have to* subscribe to multiple video distribution services if they want to watch their favorite shows and sports. Many of the most popular sports leagues have spread the rights to live sports content across multiple rights holders.[209] For example, Figure 25 shows the spread of NFL games across various rights holders.[210] Figure 26 is a screenshot from the NFL's website depicting all of the various services and networks on which consumers can watch NFL games. Since these games are not all available on one video distribution service, an NFL fan who wants to watch a variety of NFL games (including marquee games such as Monday Night Football, Thursday Night Football, Sunday Night Football, and the playoffs) would have to subscribe to multiple pay TV services. Figure 53 and Figure 54 in Appendix C show a similar pattern for the NBA and MLB.

[209] Espinosa Deposition, 44:24–46:13 [redacted]

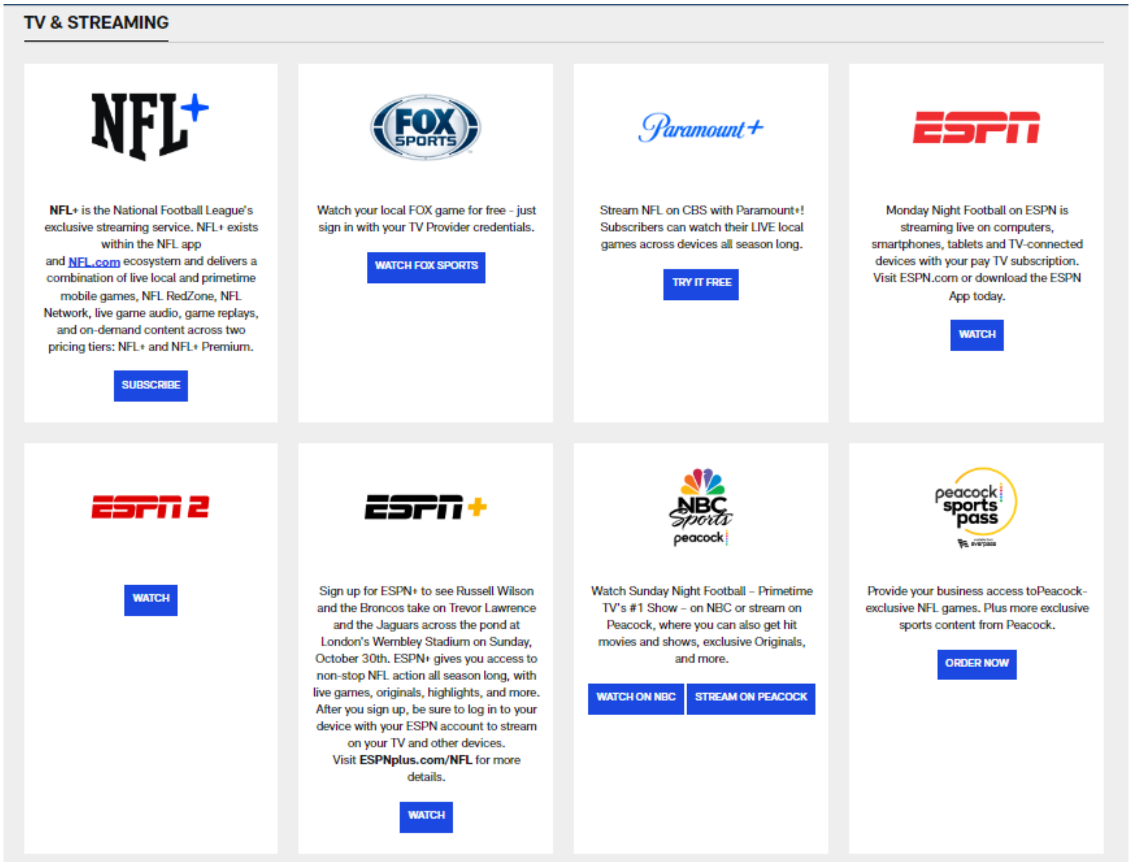
[210] This Figure excludes simulcasts of games on, among others, Paramount+ and NFL+.

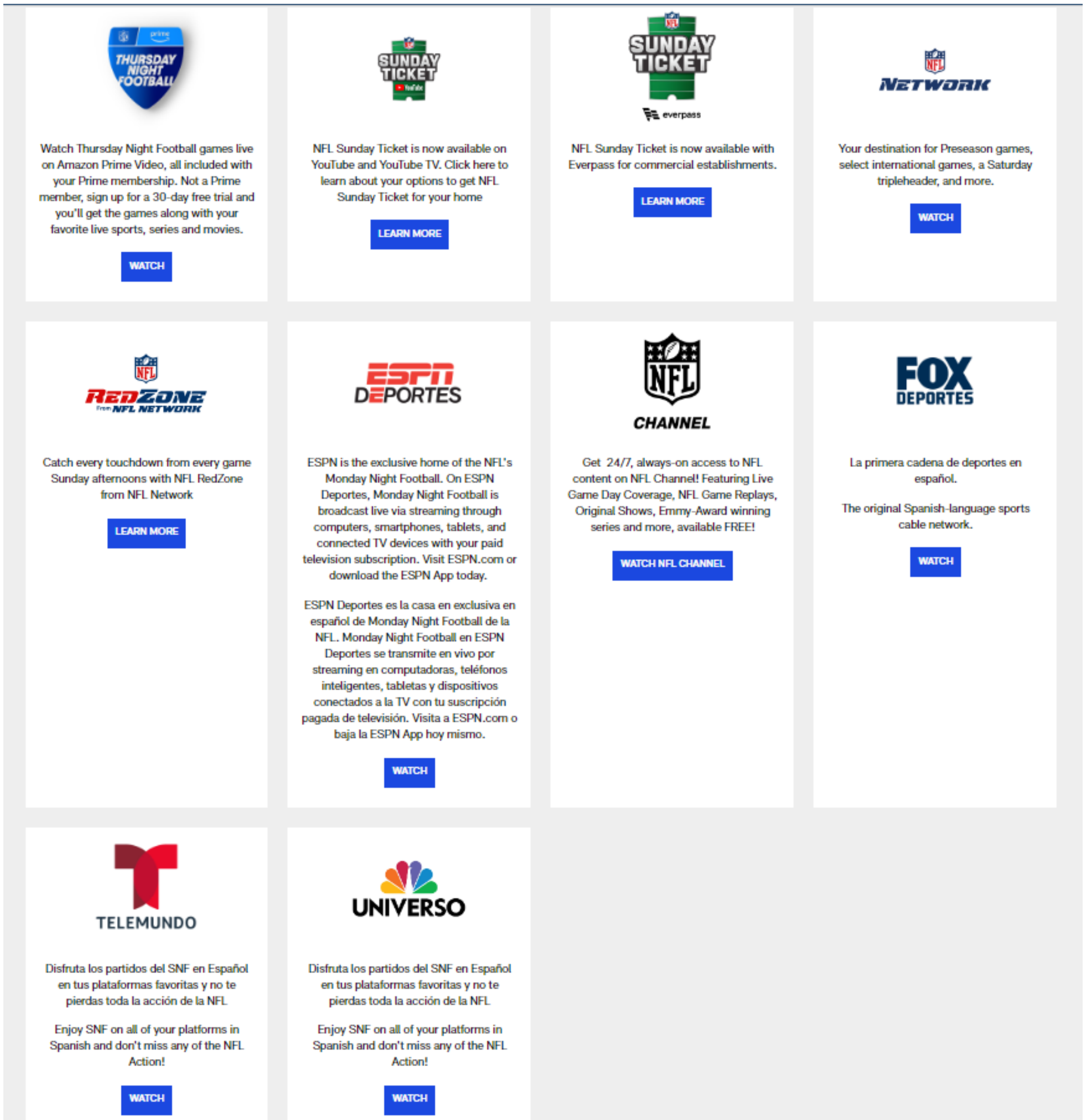
Figure 25. Telecasts of the 2024/2025 NFL Season are spread across many programmers and new direct buyers of sports rights

Event	ABC / ESPN	CBS	Fox / Fox Sports	NBC (Comcast)	NFL Network	Amazon Prime	Netflix	Peacock (Comcast)	NFL Sunday Ticket (YouTube)
Monday Night Football	x								
Thursday Night Football						x			
Sunday Games – Daytime		x	x						x***
Sunday Night Football				x					
International Games					x			x**	
Saturday Showdown					x				
Christmas Games							x		
Wild Card Weekend	x	x	x	x		x			
Division Playoffs	x	x	x	x					
Conference Championship		x	x						
Superbowl			x*						

Source: Compiled from public sources, see my backup.
Notes: A programmer is flagged as carrying a game if they carry any game. This treats a programmer that carries one game the same as a programmer that carries multiple games. CBS games also stream on Paramount+. NBC games also stream on Peacock. Out-of-market Sunday daytime games also stream on Sunday Ticket (YouTube TV). NBC also carries NFL Kickoff (Thursday, Sept. 5) and SNF on Thanksgiving (Thursday, Nov. 28). Only includes English language broadcasts. * The Superbowl rotates between the "big four" broadcasters. CBS aired the Superbowl in 2024. Fox has the rights to air the Superbowl in 2025. ** Peacock has the exclusive rights to one international game. *** Google has the exclusive rights to NFL Sunday Ticket, available as a standalone product or as an add-on to YouTube TV, which allows subscribers to watch all regular season out-of-market Sunday daytime games.

Figure 26. Screenshot from NFL.com showing different ways to watch NFL games





Source: "Ways to Watch," NFL, accessed June 19, 2024, https://www.nfl.com/ways-to-watch/.

(126) Not surprisingly, given this situation, consumers do in fact end up subscribing to multiple video distribution services. Figure 27 shows that many consumers subscribe to a variety of SVOD and sports DTC services. It summarizes the results of an S&P Global survey of more than 1,800 households who subscribe to a sports DTC service and shows that the vast majority of surveyed households also subscribe to one or more SVODs. For example, 97% of subscribers to NFL+ also subscribe to one or more SVODs, many of which also have sports programming (as indicated in bold).

Figure 27. Specialized sports DTC subscribers also subscribe to SVOD services, Q3 2023

SVOD subscription used	Total respondents	NFL+	NFL+ Premium	MLB.TV	NBA League Pass	Bally Sports+
SVOD net	83%	97%	98%	91%	96%	90%
Netflix	55%	71%	70%	63%	69%	56%
Amazon Prime Video	53%	63%	59%	57%	53%	42%
Hulu	40%	59%	60%	45%	47%	40%
Disney+	34%	55%	47%	43%	43%	42%
Paramount+	24%	41%	34%	32%	26%	33%
Max	21%	28%	26%	20%	22%	15%
Peacock Premium	19%	31%	36%	21%	35%	21%
Apple TV+	12%	28%	29%	26%	28%	13%
ESPN+	11%	35%	39%	23%	26%	19%
YouTube Premium	9%	27%	29%	17%	25%	15%
None of the above	17%	3%	2%	9%	4%	10%

Source: S&P Global Market Intelligence, "Sports viewer crosstab, Q3 2023," Capital IQ Pro, accessed July 3, 2024.
Notes: Answers to "Which of the following online video subscription services do you or someone in your household currently use," among a sample of 1,886 sports viewing households. SVODs in bold stream sports.

(127) Figure 28 (which reproduces Figure 9 in Section II.A.4.b) shows that many consumers in the survey also subscribed to multiple SVODs.

Figure 28. Most SVOD subscribers have multiple SVOD subscriptions, Q3 2023

Number of SVOD services used	Total respondents	Sports viewing households	Non-sports viewing households
0	17%	15%	25%
1	16%	15%	18%
2	14%	14%	15%
3	12%	12%	11%
4	12%	13%	9%
5+	29%	32%	22%

Source: S&P Global Market Intelligence, "Sports viewer crosstab, Q3 2023," Capital IQ Pro, accessed July 3, 2024.
Notes: Answers to "Which of the following online video subscription services do you or someone in your household currently use" among a sample of 2,500 households and 1,886 sports viewing households (sports viewing households indicated that they viewed sports in their households).

(128) Figure 29 shows that many consumers that subscribe to specialized sports DTC services subscribe to multiple DTC services.

Figure 29. Share of specialized sports DTC subscribers who subscribe to other specialized sports DTC services

DTC service used	Total respondents	MLB.TV	NFL+	NBA League Pass	NFL+ Premium	NBA Team Pass	Bally Sports+
MLB.TV	6%	100%	23%	25%	29%	24%	27%
NFL+	5%	17%	100%	28%	38%	43%	15%
NBA League Pass	4%	17%	25%	100%	29%	51%	15%
NFL+ Premium	3%	16%	28%	24%	100%	31%	6%
NBA Team Pass	3%	10%	25%	33%	24%	100%	8%
Bally Sports+	2%	9%	7%	8%	3%	6%	100%

Source: S&P Global Market Intelligence, "Sports viewer crosstab, Q3 2023," Capital IQ Pro, accessed July 3, 2024.
Note: Responding to the question "The following online subscription sports services provide live streams of games and other content. Which of the following do you or someone in your household use?" Includes the top ten services by subscribers from the survey. The * corresponds to a service with a "small base" according to S&P Global. The first column, "Total Respondents," indicates the share of survey respondents that subscribe to each DTC service reading down. For example, 6% of respondents subscribe to MLB.TV. Reading across, 23% of NFL+ subscribers also subscribe to MLB.TV.

(129) The fact that consumers subscribe to multiple SVODs and sports DTC services also shows that Mr. Orszag's focus on the difference in price levels between these services and those of MVPDs and vMVPDs does not support his view that these services are not a significant competitive constraint on the pricing of vMVPD and MVPD services. The more appropriate comparison of prices would be between the total price of the services to which consumers actually want to subscribe. This could be a combination of services that seeks to mimic the broad set of content offered by a pay TV service or a combination of services that provides a narrower set of content.

(130) A February 2024 Fox presentation titled "Project Raptor OOC Approval Request" compares the live sports available from SVOD services to those that would be included in the JV. One slide in the presentation, shown in Figure 30 (which reproduces Figure 10 shown in Section II.A.4.b), concludes, [redacted][211]

[211] In addition, viewers' access to WBD's and Disney's live sports outside of an MVPD or vMVPD will not be limited to the JV. Viewers can currently access WBD's live sports through Max's Bleacher Report add-on and will be able to access Disney's live sports through ESPN Flagship product, expected to launch in fall 2025. The ESPN Flagship service will be available as a standalone product or as a bundle with Disney+. Warner Bros. Discovery, "Bleacher Report (B/R) Sports Add-On Tier is Available on Max Today," news release, October 5, 2023, https://press.wbd.com/us/media-release/max/bleacher-report-br-sports-add-tier-available-max-today; Samantha Masunaga, "ESPN's Standalone Streaming Service Will Be Added to Disney+ in 2025," *Los Angeles Times*, April 3, 2024, https://www.latimes.com/entertainment-arts/business/story/2024-04-03/espn-streaming-disney.

[redacted]

(131) Other evidence supports the view that, contrary to Mr. Orszag's market definition, consumers substitute between watching video content on vMVPDs and MVPDs and watching video content through other channels such as SVODs and other streaming services, including:

- A Fubo document titled "Offsite Pre-Read: What's Next?" refers to [redacted][212]
- A March 2024 J.P. Morgan analyst report states Fubo "cannot maintain its value proposition as programmers increasingly make sports accessible on DTC platforms (exclusive NFL games on Peacock, CBS simulcast on Paramount+, TNF on Amazon Prime Video, B/R Sports add-on on Max, the announced JV, and even a potential ESPN OTT product)."[213]

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[212] FUBO_0097919, at -919.

[213] Nikhil Aluru et al., "Remain Underweight on Long-Term Competition," *J.P. Morgan*, March 1, 2024, 1.

- One recent analysis stresses the increasing competition in live sports streaming between Fubo and well-capitalized competitors such as Apple, Amazon, and Google.[214]
- In its 2023 10-K, EchoStar, the parent company of DISH Network, notes that "Our Pay-TV services also face increased competition from programmers and other companies who distribute video directly to consumers over the Internet, as well as traditional satellite television providers, cable companies, and large telecommunications companies." EchoStar's 10-Q continues, "We also face competition from providers of video content, many of which are providers of programming content to us, that distribute content over the Internet including services with live-linear television programming, as well as single programmer offerings and offerings of large libraries of on-demand content, including in certain cases original content." EchoStar lists Netflix, Hulu, Apple+, Prime Video, YouTube TV, Disney+, ESPN+, Paramount+, Max, STARZ, Peacock, Fubo, Philo and Tubi as competitors that fall under these categories.[215]
- Netflix's 2023 10-K describes that its competition includes "other entertainment video providers, such as linear television, and streaming entertainment providers."[216]
- In 2021, media magazine Digiday described the "war for attention" of TV and streaming viewership that "Netflix is not only in competition with traditional TV networks and streaming services like Disney+, HBO Max, Hulu and Peacock but also with digital video platforms like YouTube."[217]
- A DirecTV presentation indicates that in May 2024, [redacted][218] [redacted][219]
- A March 2023 Disney presentation titled "The State of Media" notes [redacted][220]

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214 Mountainside Research, "fuboTV: Rapid Increase Of Well-Capitalized Competitors," *Seeking Alpha*, May 3, 2024, https://seekingalpha.com/article/4689188-fubotv-rapid-increase-of-well-capitalized-competitors.

215 EchoStar, *Form 10-K*, February 29, 2024, 5.

216 Netflix, *Form 10-K*, January 26, 2024, 4.

217 Tim Peterson, "This Fall, TV Networks, Streamers, and Ad Buyers Will Tune into the Return of TV," *Digiday*, August 23, 2021, https://digiday.com/future-of-tv/this-fall-tv-networks-streamers-and-ad-buyers-will-tune-into-the-return-of-tv/.

218 DTV-Fubo-000002345, at -352.

219 DTV-Fubo-000002345, at -359.

220 TWDC_FUBO_00021713, at -734.

(132) Mr. Orszag emphasizes the importance of live sports programming for consumer subscription choices. As I showed in Figure 2 and discussed in Section II.A.2.a, in recent years, newer entrants into live sports telecasting like Amazon, Apple, Google, Netflix, and Roku have joined traditional sports programmers such as ABC/ESPN, NBC, CBS, Fox and WBD in bidding for the media rights of major sports. This has transformed how consumers view live sports, and the competitive pressure from these alternative video distributors is only expected to grow.[221] As I noted in Section II.A.2.a, recent expansions of sports DTC services include:

- The NFL launched its DTC streaming service, NFL+, in 2022. In 2023, the league announced that the service exceeded its expectations, and it would add NFL Network and NFL RedZone to NFL+.[222] The NFL explained that the service "marks the next evolution of [our] direct-to-consumer strategy …[giving] fans unprecedented year-round inside access to the entire NFL calendar."[223]
- In 2022, NBA League Pass offered a new bundle at its lowest pricing ever and upgraded the service to include "expanded options for personalized viewing experiences through a wide variety of alternate streams, including additional camera angles, betting-focused streams, influencer-led and analytics-driven options, and in-language feeds with commentary in three languages."[224] In the next year, the NBA announced its reimagined NBA App, which integrates NBA League Pass and NBA TV, as part of the NBA's "larger direct-to-consumer efforts."[225]
- The MLB plans to extend its DTC service, MLB.TV, offerings in 2025 to eliminate local blackouts by acquiring TV rights for at least 14 teams, according to the league's Commissioner, Rob Manfred.[226]

(133) SVOD services are also expanding their live sports offerings.

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[221] Tripp Mickle, Kevin Draper and Benjamin Mullin, "Why Big Tech is Making a Big Play for Live Sports," *The New York Times*, July 24, 2022, https://www.nytimes.com/2022/07/24/technology/sports-streaming-rights.html.

[222] Joe Reedy, "NFL Network and NFL RedZone Will Be Offered Direct to Consumer on 'NFL+' Service," *AP*, August 10, 2023, https://apnews.com/article/nfl-network-nfl-redzone-streaming-c8b8140d21e80f47799b5379f54e5c1d.

[223] NFL, "NFL Launches for the 2023 Season; Now Includes NFL Network, NFL RedZone," news release, August 10, 2023, https://www.nfl.com/news/nfl-launches-for-the-2023-season-now-includes-nfl-network-nfl-redzone.

[224] NBA, "NBA Launches Reimagined App: The All-In-One Destination for NBA Fans of Every Team," news release, September 27, 2022, https://pr.nba.com/nba-launches-reimagined-app-the-all-in-one-destination-for-nba-fans-of-every-team/.

[225] NBA, "NBA Launchpad Seeks Innovation Submissions for Third Season," news release, September 8, 2023, https://pr.nba.com/nba-launchpad-seeks-innovation-submissions-for-third-season/.

[226] Bobby Nightengale, "MLB Commissioner Rob Manfred Wants Streaming for Teams Like the Twins," *Yahoo Finance*, February 8, 2024, https://finance.yahoo.com/news/mlb-commissioner-rob-manfred-wants-205900399.html?guccounter=1.

- Netflix will show two exclusive NFL games in 2024. In addition, the SVOD will begin streaming WWE's weekly flagship show in 2025 after purchasing the rights for $5 billion.[227]
- In 2022, Apple signed a seven-year, $595 million deal with the MLB and a 10-year, $2.5 billion deal with the MLS.[228] Apple is in negotiations with FIFA for an estimated $1 billion contract to show the expanded Club World Cup.[229]
- Amazon signed an $11 billion deal to be the sole broadcaster of Thursday Night Football beginning in 2022.[230] In 2023, Amazon gained exclusive rights to broadcast five of NASCAR's Cup Series in a seven-year deal.[231] In early 2024, Amazon "significantly expanded its sports coverage" by investing in Diamond Sports and acquiring television rights to 11 MLB, 15 NBA, and 11 NHL teams.[232]

III.B.2. Mr. Orszag provides no valid independent analyses to support his claim that there may be a narrower relevant market for vMVPDs, and the evidence indicates that no such relevant market exists

(134) Mr. Orszag also claims that there is "likely a narrower relevant market that consists solely of vMVPD services, such as Fubo, YouTube TV, Hulu + Live TV, and Sling."[233]

(135) As a starting point, I note that this claim is contradicted by Fubo's own statements in its 10-Ks, which indicate that its vMVPD service competes "principally" with other "Pay TV operators" including both traditional MVPDs "along with" vMVPDs;[234] Fubo thus does not draw the distinction that Mr. Orszag

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227 Tom Burrows, "Why Netflix Has Joined Apple, Amazon, Disney, and Other Streamers in the Battle for Live Sports," *The Athletic*, May 26, 2024, https://www.nytimes.com/athletic/5508954/2024/05/26/netflix-nfl-streaming-apple-amazon-disney/.

228 Mike Ozanian, "MLB Deals with Apple And NBC Sports Are Worth A Combined $115 Annually," *Forbes*, March 14, 2022, https://www.forbes.com/sites/mikeozanian/2022/03/09/mlb-deals-with-apple-and-peacock-worth-115-million-annually-combined/ ("The new streaming deal between Major League Baseball and Apple is worth $85 million annually over seven years."); Joe Reedy, "Apple Embraces Potential of Sports Streaming with MLS Deal," *Associated Press*, February 1, 2023, https://apnews.com/article/mlb-technology-sports-television-baseball-5f5ba756efea27be391d36e7d565bee8.

229 Tom Burrows, "Why Netflix Has Joined Apple, Amazon, Disney, and Other Streamers in the Battle For Live Sports," *The Athletic*, May 26, 2024, https://www.nytimes.com/athletic/5508954/2024/05/26/netflix-nfl-streaming-apple-amazon-disney/.

230 Alex Sherman, "Amazon's Exclusive 'Thursday Night Football' Package Will Begin In 2022 instead of 2023," *CNBC*, May 3, 2021, https://www.cnbc.com/2021/05/03/amazons-thursday-night-football-package-will-begin-in-2022-instead-of-2023.html.

231 Julie Coleman, "NASCAR President Talks New Streaming Deal, says Amazon Is 'Here To Stay' In Sports," *CNBC*, January 29, 2024, https://www.cnbc.com/2024/01/29/nascar-president-talks-steaming-deal-says-amazon-is-here-to-stay.html.

232 Mike Chiari, "Amazon Invests in Diamond Sports Amid Bankruptcy Deal; Owns 18 Regional Networks," *Bleacher Report*, January 17, 2024, https://bleacherreport.com/articles/10105445-amazon-invests-in-diamond-sports-amid-bankruptcy-deal-owns-18-regional-networks.

233 Updated Orszag Declaration, ¶ 54.

234 Fubo, *Form 10-K*, March 5, 2024, 9.

wishes to draw between traditional MVPDs and vMVPDs. Moreover, Fubo's 10-K further acknowledges that Fubo competes (albeit, according to Fubo, to a lesser extent) with SVOD and DTC services:

> We principally compete with Pay TV operators, such as Comcast, Cox and Altice, along with other virtual multichannel video programming distributors ("vMVPDs"), such as YouTube TV, Hulu + Live and Sling TV. We also compete to a lesser extent with network-operated direct-to-consumer streaming services, such as Peacock, Paramount+, ESPN+, and would expect to compete with the proposed joint venture between The Walt Disney Company ("Disney"), Fox Corporation ("Fox") and Warner Brothers Discovery, Inc. ("WBD") (the "Network JV"), which, if it becomes operational, would operate a new sports streaming service.[235]

(136) Further, a Fubo document titled "OTT & Sports: Services and Strategies for Growth Industry Report," describes [redacted][236] Other ordinary course documents from Fubo and testimony from Fubo executives indicate that [redacted] (see the discussion in Section III.B.1.b.).

(137) To support his claim that vMVPDs are in their own downstream market, Mr. Orszag asserts that purchasers of vMVPD packages are a distinct set of consumers, and erroneously cites the (now superseded) 2010 *Horizontal Merger Guidelines* claiming that these vMVPD customers can be "targeted" with a price increase (that would not be imposed on other customers) and hence that sales to them can be a valid market.[237]

(138) Mr. Orszag's citation of the *Guidelines* as support is improper. For the *Guidelines*' targeted customer analysis to apply, "the suppliers engaging in targeting must be able to set different terms for targeted customers than other customers."[238] vMVPDs do not generally set different prices to different

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[235] Fubo, *Form 10-K*, March 5, 2024, 9. *See also* Fubo, *Form 10-K*, March 5, 2024, 22 ("Google (through YouTube TV) and, to a lesser extent, Amazon (through Amazon Prime) compete with us.").

[236] FUBO_0063681, at -681.

[237] Updated Orszag Declaration, ¶ 56 ("One reason that the sale of vMVPD services is a distinct market is that purchasers of vMVPD services are a distinct set of customers. As noted by the 2010 Horizontal Merger Guidelines '[i]f a hypothetical monopolist could profitably target a subset of customers for price increases, the Agencies may identify relevant markets defined around those targeted customers.'").

[238] *2023 Merger Guidelines*, § 4.3.D.1, 44 ("If the merged firm could profitably target a subset of customers for changes in prices or other terms, the Agencies may identify relevant markets defined around those targeted customers... For targeting to be feasible… the suppliers engaging in targeting must be able to set different terms for targeted customers than other customers."). *See also* US Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, August 19, 2010, [hereinafter "*2010 Horizontal Merger Guidelines*"], §3, 6 ("When examining possible adverse competitive effects from a merger, the Agencies consider whether those effects vary significantly for different customers purchasing the same or similar products. Such differential impacts are possible when sellers can discriminate, e.g., by profitably raising price to certain targeted customers but not to others. The possibility of price discrimination influences market definition, the measurement of market shares, and the evaluation of competitive effects.").

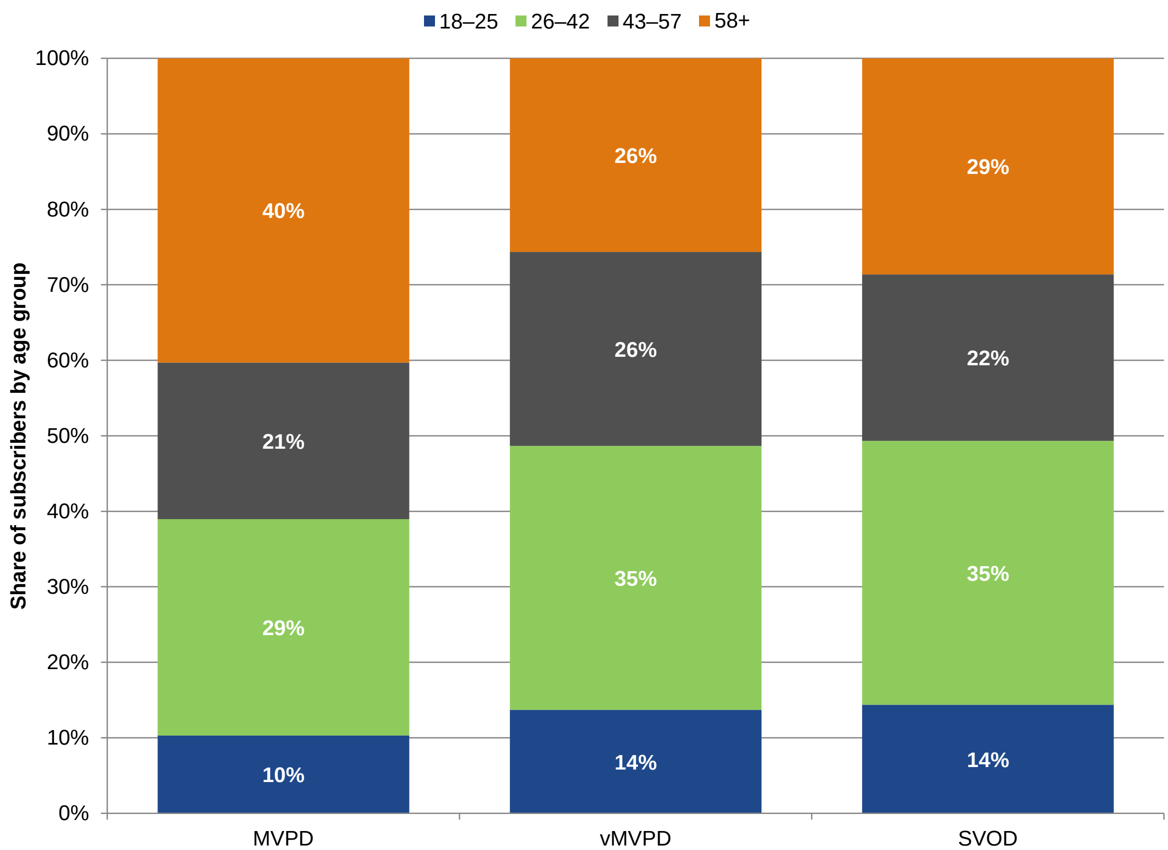
consumers purchasing the same product.[239] Subscribers of vMVPDs benefit from the competition among MVPDs, vMVPDs, SVODs, and DTC services. The fact that some types of consumers choose to subscribe to vMVPDs is not evidence that these consumers are "targeted" in the meaning of the term as used in the *Guidelines*.

(139) Mr. Orszag also argues that [redacted][240] As shown in Figure 31, however, [redacted] Thus, Mr. Orszag's logic would suggest that [redacted]

[239] For example, for evidence about Fubo's pricing see "What is the Regional Sports Fee?" Fubo, January 17, 2024, https://support.fubo.tv/hc/en-us/articles/360046050051-What-is-the-Regional-Sports-Fee.

[240] Updated Orszag Declaration, ¶ 57. [redacted]

Figure 31. Distribution of age among subscribers to MVPDs, vMVPDs, and SVODs



Source: S&P Global Market Intelligence, "Traditional multichannel banner (US), Q1 2023," Capital IQ Pro, accessed June 10, 2024; S&P Global Market Intelligence, "Virtual multichannel banner (US), Q1 2023," Capital IQ Pro, accessed June 10, 2024; S&P Global Market Intelligence, "US SVOD user trends and demographics banner, Q1 2023," Capital IQ Pro, accessed June 12, 2024.

(140) Moreover, the fact that consumers subscribing to MVPDs and those subscribing to vMVPDs may have different characteristics on average does not imply that there is not substantial substitution between these products by consumers who find both options attractive.

(141) Substitution between MVPDs and vMVPDs has in fact been one of the, if not *the*, most prominent trends in this industry. Indeed, Mr. Trautman's Figure 1 shows that there has in fact been a marked shift in subscribership from MVPDs to vMVPDs in recent years, suggesting these are close substitutes.[241] My own analysis, shown in Figure 7 in Section II.A.4.a above confirms this fact as well. This substitution has involved a movement from MVPDs to vMVPDs (and to alternative non-pay TV distributors as well) as new vMVPD services have entered the marketplace, but this same

[241] Updated Trautman Declaration, Figure 1.

group of consumers would also be highly likely to shift back to MVPDs in response to a worsening of vMVPD offerings.

(142) Mr. Orszag notes in his Updated Declaration that "market participants need not impose symmetric constraints on each other," which he says can reflect differences in the "diversion ratio (*i.e.*, the degree to which subscribers substitute)."[242] [redacted].[243] Thus, there is evidently substantial substitution (*i.e.*, diversion) between Fubo, a vMVPD, and cable MVPDs. There would be even more if one included the other types of MVPDs. In fact, given that cable MVPDs had roughly 50% of the non-Fubo subscribers to pay TV services in 2023, substitution to Fubo was disproportionately high from these cable firms relative to their share.[244]

(143) Mr. Orszag claims as well that vMVPDs have distinct uses, characteristics, and prices compared to MVPDs. However, the differences that Mr. Orszag claims are either small or unlikely to be of much relevance to consumers.

(144) Figure 32 presents a scatterplot of vMVPD and MVPD packages by price and number of channels. It shows that MVPDs and vMVPDs offer packages at different price points, and that any variation across the categories of MVPDs and vMVPDs is similar to variation within the category of vMVPDs itself. The services offered by vMVPDs and MVPDs are similar in other ways as well. Packages from vMVPDs and MVPDs each include substantial sports programming,[245] and have similar options for add-on services that include SVODs and other DTC options.[246]

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242 Updated Orszag Declaration, ¶ 29, n. 23.

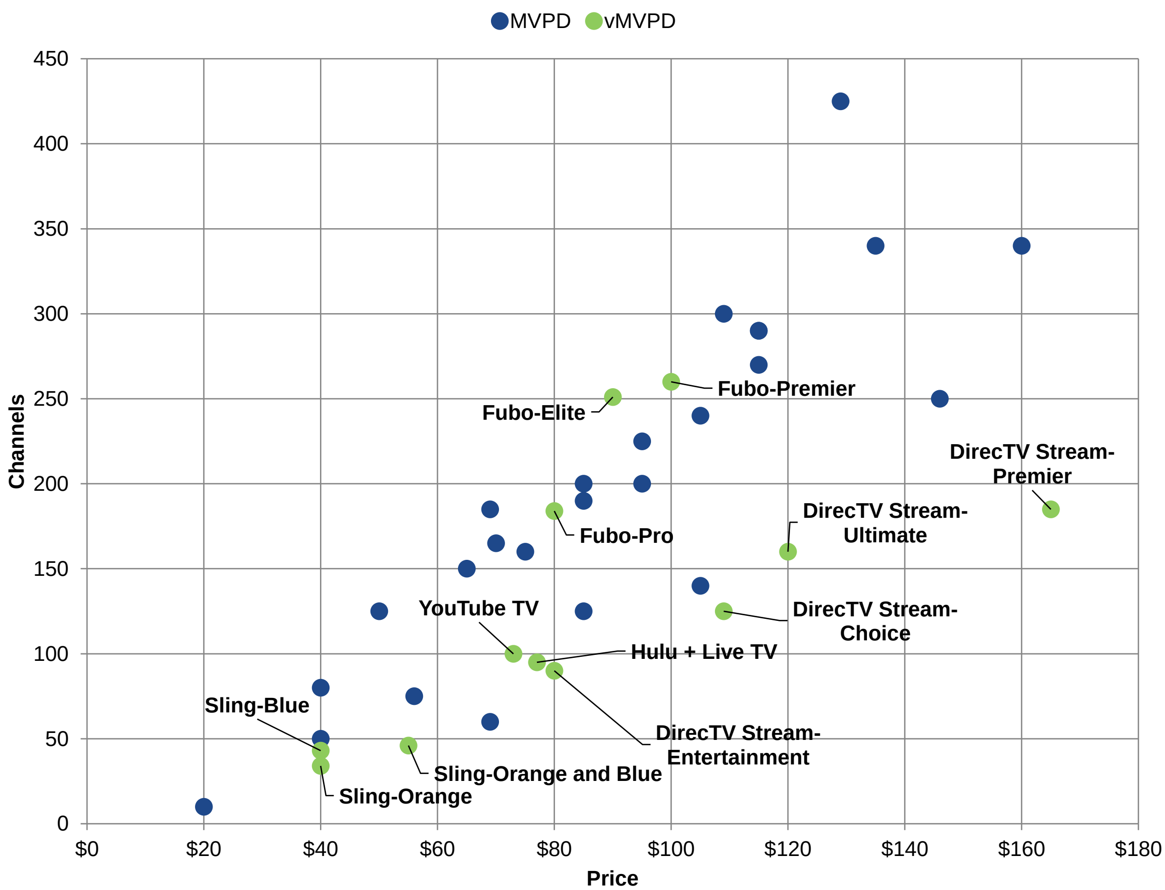
243 Updated Orszag Declaration, ¶ 57.

244 See "03 Cable Shares.xlsx" in my backup.

245 YouTube TV offers channels like BTN, ESPN, FS1, Golf channel, TNT, USA, and more. *See, e.g.*, "Welcome," YouTube TV, accessed July 8, 2024, https://tv.youtube.com/welcome/; Hulu + Live TV offers channels like ABC, FOX, BTN, ESPN, FS1, NFL Network, TNT, and more. "Hulu + Live TV," Hulu, accessed July 8, 2024, https://www.hulu.com/live-tv; Verizon's More Fios TV package offers ACC Network, BTN, ESPN, FS1, NFL Network, TNT, and more. "Consumer Fios TV Listings," Verizon, accessed July 8, 2024, https://www.verizon.com/supportresources/content/dam/verizon/support/consumer/documents/verizon_consumer_fios_tv_channel_lineup.pdf. *See* Figure 17 in Section II.C, which shows the substantial sports programming offered by Comcast, Fubo, and YouTube TV in terms of share of sports event audience hours.

246 "Disney+ Through Spectrum," Disney+, accessed July 8, 2024, https://help.disneyplus.com/article/disneyplus-en-us-spectrum ("If you're an eligible Spectrum customer, you can activate Disney+ Basic at no additional cost."); Hulu + Live TV comes bundled with ESPN+ and Disney+. Subscribers can elect add-ons like Max, Paramount+ with SHOWTIME, and more. "Hulu + Live TV," Hulu, accessed July 8, 2024, https://www.hulu.com/live-tv; Xfinity offers add-ons like Max, Paramount+ with SHOWTIME, NFL Network, MLB Network, and more. "Customize Your TV Experience," Xfinity, accessed July 9, 2024, https://www.xfinity.com/learn/digital-cable-tv/add-channels; Subscribers can elect add-ons like Max, Paramount+ with SHOWTIME, and more. Subscribers can also elect to bundle NFL Sunday ticket, NBA League Pass, and more. "Welcome," YouTube TV, accessed July 8, 2024, https://tv.youtube.com/welcome; Fubo offers add-ons like Paramount+ with SHOWTIME, sports channel add-ons which include NFL Redzone, NBA TV, MLB Network, and more, and sports DTC service add-ons like NBA League Pass. Fubo Channels Page, Fubo, accessed July 9, 2024, https://www.fubo.tv/welcome/channels.

Figure 32. vMVPD and MVPD packages by price and number of channels



Source: Compiled from public sources. See my backup.
Notes: Prices are list prices and do not include equipment fees, one-time set up or installation costs, or RSN fees. For example, Fubo customers are charged up to $15 in RSN fees, but that fee is not reflected in the package list price. "What is the Regional Sports Fee?" Fubo Help Center, accessed June 19, 2024, https://support.fubo.tv/hc/en-us/articles/360046050051-What-is-the-Regional-Sports-Fee.

(145) Contrary to Mr. Orszag's claims, differences in delivery mechanisms are not likely to be an important differentiator between vMVPDs and MVPDs. In recent years, MVPDs have introduced new ways for consumers to view their MVPD services. The four largest MVPDs—Charter, Comcast, DirecTV, and DISH Network—now offer consumers the ability to stream their MVPD services on smart TVs, smartphones, and tablets through apps similar to vMVPDs.[247] Virtually all households in the United

[247] MVPD customers automatically get access to these streaming apps. Note that the DirecTV app, access to which is included in a DirecTV satellite subscription, is not the same as DirecTV Stream, which is a separate vMVPD product. Altice and Verizon Fios also offer their customers access to streaming apps. "How to Stream Live TV on Your Devices," Spectrum, accessed June 19, 2024, https://www.spectrum.com/resources/tv-streaming/how-to-stream-live-tv-on-your-devices ("Every Spectrum TV® plan comes with free access to the Spectrum TV® App. You can downloaded [sic] the app for each device, like Apple's App Store, Google's Play Store or the Roku Channel Store. The app is compatible with most smartphones, tablets and a host of streaming devices."); "Xfinity Stream TV App," Comcast,

States have access to broadband internet service.[248] Virtually all US adults own a cellphone of some kind and roughly 90% of US adults own a smartphone.[249] A high share of US adults, 69% to 84%, depending on age, own a smart TV.[250]

(146) Figure 33 presents screenshots from each of these MVPD's websites promoting the ability for consumers to access their pay TV service at home on a smart TV or on the go using their Android or iOS smartphone or tablet.

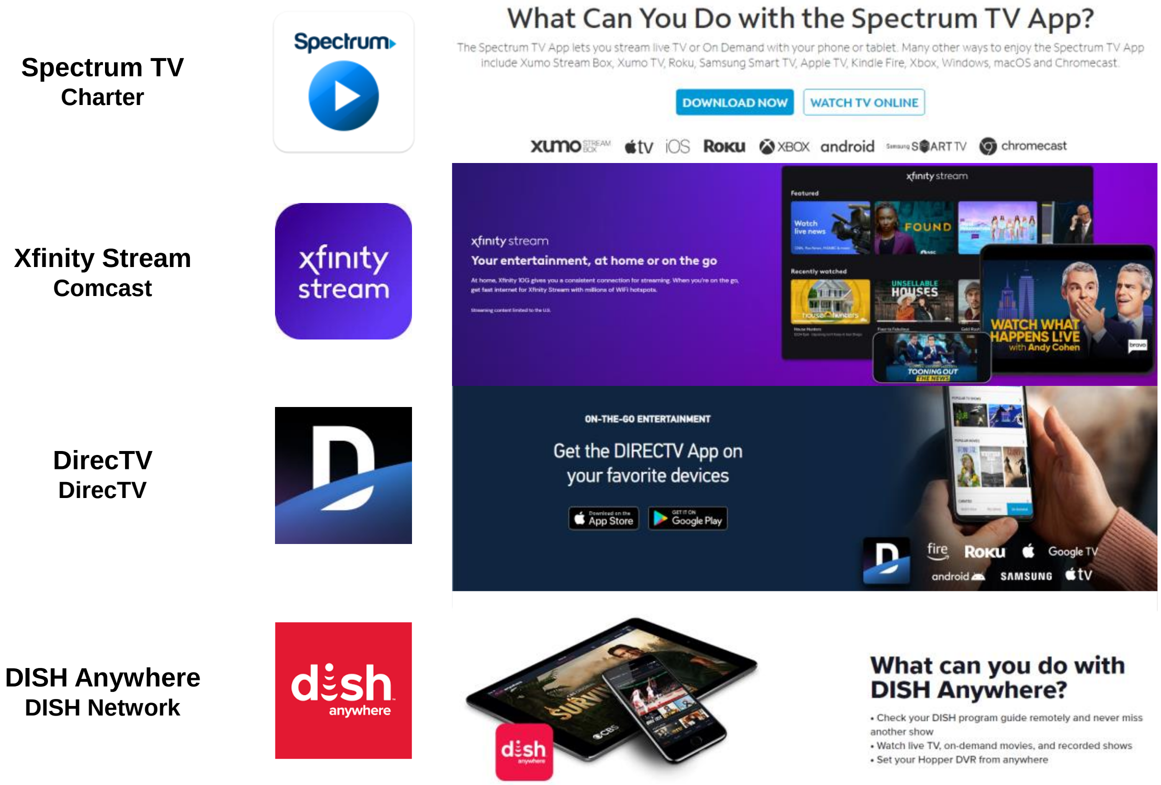
accessed June 19, 2024, https://www.xfinity.com/get-stream ("The Xfinity Stream app is included with both Xfinity Internet and Xfinity TV services. Instantly enjoy TV shows, news, and live sports while your TV box is on the way."); "Watch TV on the DIRECTV App," DirecTV, accessed June 19, 2024, https://www.directv.com/support/article/000084350 ("Launch the app and sign in with your directv.com user ID and password to watch live TV."); "TV Streaming On-The-Go with DISH Anywhere," DISH, accessed June 19, 2024, https://www.dish.com/features/dish-anywhere ("DISH Anywhere streaming TV service is included with your DISH satellite service. Use it on your connected devices. Binge on your Smart TV, laptop, cell phone, or tablet with the DISH Anywhere app."); "Optimum TV," Optimum, accessed June 25, 2024, https://www.optimum.net/pages/alticeone/app.html ("Keep up with your favorite shows no matter where you are with the Optimum TV App."); "Fios TV Mobile App," Verizon, accessed June 25, 2024, https://www.verizon.com/home/fios-tv/mobile-app/ ("Watch TV virtually anywhere. At home and on the go.").

[248] According to S&P Global, 96.6% of households have broadband internet service in their home. S&P Global Market Intelligence, "Kagan Consumer Insights, United States 2023," Capital IQ Pro (Answers to "Please select your current home broadband internet service provider" among as sample of 2,500 respondents); The 2022 American Community Survey reports 91.2% of households had an internet subscription. U.S. Census Bureau, "Presence and Types of Internet Subscriptions in Household," American Community Survey, 2022, ACS 1-Year Estimates Detailed Tables, Table B28002, accessed June 25, 2024, https://data.census.gov/table/ACSDT1Y2022.B28002; Pew Research reports 80% of US adults subscribe to high-speed internet at home. Risa Gelles-Watnick, "Americans' Use of Mobile Technology and Home Broadband," *Pew Research Center*, January 31, 2024, https://www.pewresearch.org/internet/wp-content/uploads/sites/9/2024/01/PI_2024.01.31_Home-Broadband-Mobile-Use_FINAL.pdf.

[249] Risa Gelles-Watnick, "Americans' Use of Mobile Technology and Home Broadband," *Pew Research Center*, January 31, 2024, https://www.pewresearch.org/internet/wp-content/uploads/sites/9/2024/01/PI_2024.01.31_Home-Broadband-Mobile-Use_FINAL.pdf.

[250] Umair Bashir, "Share of Americans Owning a Smart TV as of March 2024, By Age," *Statista*, May 30, 2024, https://www.statista.com/statistics/754397/people-living-in-households-that-own-smart-tv-usa/.

Figure 33. MVPD streaming apps on smart TVs, smartphones, and tablets



Source: "Spectrum TV App," Spectrum, accessed July 2, 2024, https://www.spectrum.com/cable-tv/streaming/spectrum-tv-app; "Xfinity Stream," Xfinity, accessed July 2, 2024, https://www.xfinity.com/get-stream; "DirecTV Stream," DirecTV Stream, accessed July 2, 2024, https://streamtv.directv.com/; "Stream TV Anywhere on your connected devices — FREE," DISH, accessed July 2, 2024, https://www.dish.com/features/dish-anywhere.

(147) As one example, in April 2022, Comcast and Charter formed a joint venture to develop a streaming platform on a variety of branded 4K streaming devices and smart TVs.[251] At the end of 2023, Comcast and Charter unveiled the Xumo Stream Box for their Spectrum and Xfinity customers (referenced in Section II.A.4.a). The Xumo Stream Box is a streaming device that allows customers to access live TV channels through each cable company's respective apps, including Spectrum TV or Xfinity Stream, as well as streaming services like Netflix, Hulu, and Max.[252] Customers can replace their set top boxes with the Xumo Stream Box.[253]

[251] NASDAQ, "Charter and Comcast Announce Joint Venture to Develop and Nationally Offer a Next Generation Streaming Platform," news release, April 27, 2022, https://www.nasdaq.com/press-release/charter-and-comcast-announce-joint-venture-to-develop-and-nationally-offer-a-next.

[252] Comcast, "Xumo Begins Nationwide Rollout of Its First Streaming Devices in Charter and Comcast Households," news release, October 4, 2023, https://corporate.comcast.com/press/releases/xumo-nationwide-rollout-streaming-devices-charter-comcast-households.

[253] Nathaniel Meyersohn, "Cable Companies Are Replacing Ancient Cable Boxes With These Tiny New Gadgets," *CNN*, January 18, 2024, https://www.cnn.com/2024/01/18/tech/cable-box-xumo/index.html.

(148) Other MVPDs have released their own hardware devices to allow customers to watch their live TV offerings along with popular streaming apps. For example:

- In November 2020, Verizon announced Stream TV, a streaming box that simplifies the user experience for watching live TV and content on streaming apps.[254] New Verizon customers can get Stream TV for free with a new installation.[255] More recently, in November 2023, Verizon launched Fios TV+, allowing customers to watch live TV through Fios as well as use streaming apps such as Netflix or Hulu on a single device.[256] Existing customers can receive their first Fios TV+ box for no added cost.[257]
- In July 2021, Altice released Optimum Stream, a streaming box that offers its broadband customers the ability to watch live TV with the Optimum TV app and streaming apps such as Netflix and Hulu, all in the same place.[258] Optimum Stream is free for existing Optimum customers on certain plans.[259]
- In Spring 2023, DirecTV released a new streaming player called Gemini for its customers.[260] This streaming device allows customers to watch live TV through DirecTV, and their streaming apps, all in one place.[261] Existing customers can receive their first Gemini for free to replace their existing DirecTV box.[262]

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[254] Verizon, "Verizon Puts the Best Streaming Content in One Place with Next-Gen Stream TV," news release, November 11, 2020, https://www.verizon.com/about/news/verizon-stream-tv.

[255] Verizon, "Verizon Puts the Best Streaming Content in One Place with Next-Gen Stream TV," news release, November 11, 2020, https://www.verizon.com/about/news/verizon-stream-tv.

[256] Verizon, "Fios Customers Can Watch Live TV and Their Favorite Streaming Services in One Place with Fios TV+," news release, November 30, 2023, https://www.verizon.com/about/news/live-tv-streaming-services-one-place-fios-tv.

[257] Jeff Baumgartner and Mike Dano, "Verizon Dives Deeper into Streaming with Fios TV+, Netflix/Max Bundle," *Light Reading*, December 4, 2023, https://www.lightreading.com/video-streaming/verizon-dives-deeper-into-streaming-with-fios-tv-netflix-max-bundle.

[258] "Optimum Stream," Optimum, accessed June 25, 2024, https://www.optimum.net/pages/stream.html.

[259] Altice, "Altice USA Introduces Optimum Stream and Suddenlink Stream: A Best-In-Class Streaming Experience for the Company's Broadband Customers," news release, July 19, 2021, https://www.alticeusa.com/news/articles/press-release/news/altice-usa-introduces-optimum-stream-and-suddenlink-stream-best-class-streaming-experience-company%E2%80%99s.

[260] "More Watching. Less Browsing," DirecTV, accessed June 25, 2024, https://www.directv.com/technology/gemini/.

[261] "More Watching. Less Browsing," DirecTV, accessed June 25, 2024, https://www.directv.com/technology/gemini/.

[262] "More Watching. Less Browsing," DirecTV, accessed June 25, 2024, https://www.directv.com/technology/gemini/.

III.B.3. Mr. Orszag's assertion of a narrow relevant market for "skinny sports bundles" is incorrect

(149) In his Supplemental Declaration, Mr. Orszag defined a relevant market for "skinny sports bundles" that was not mentioned in his original declaration.[263] In his Updated Declaration, he expands his explanation for why he believes this is an appropriate relevant market for analyzing the transaction.[264]

(150) I first note that exactly what Mr. Orszag intends to include in this market is unclear. He states that "skinny sports bundles" are "streaming packages containing a limited number of channels that all have live sports content."[265] But he also asserts that the market "has no current participants," and so he apparently is not including sports DTC services such as NBA League Pass, NFL+, and Bally Sports+ that do in fact contain a limited number of channels—in fact, fewer ("skinnier") than the JV—all of which have live sports.[266] In fact, they contain 100% sports content.

(151) His argument for the existence of this relevant market consists of three elements. [redacted][267]

(152) Mr. Orszag again wraps this argument in citations to the *Merger Guidelines*' discussion of targeted customers. As I noted in the previous section, these citations are improper. This is because the *Merger Guidelines'* targeted customer analysis applies only when a supplier is able to set "different terms for targeted customers than other customers" for the same product, which is a different context than the one to which Mr. Orszag seeks to apply the concept.[268]

(153) More importantly, Mr. Orszag's complete omission of any consideration of consumer substitution to sports DTC services is a critical flaw in his argument; consumers who are only interested in sports would be able to combine those services into a package that is *100%* sports programming, in marked

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[263] Supplemental Orszag Declaration, ¶¶ 3–7. *See also* Orszag Declaration.

[264] Updated Orszag Declaration, ¶¶ 63–72.

[265] Updated Orszag Declaration, ¶ 18.

[266] NBA League Pass contains one linear channel. *See* "NBA League Pass," *NBA*, accessed June 13, 2024, https://www.nba.com/watch/league-pass-stream; NFL+ contains one linear channel. *See* "Explore NFL+," NFL, accessed May 20, 2024, https://www.nfl.com/plus/learn-more; "Packages," Bally Sports, accessed July 1, 2024, https://www.ballysports.com/packages.

[267] Updated Orszag Declaration, ¶ 63.

[268] *See e.g.*, *2023 Merger Guidelines*, § 4.3.D.1, 44 ("If the merged firm could profitably target a subset of customers for changes in prices or other terms, the Agencies may identify relevant markets defined around those targeted customers... For targeting to be feasible… the suppliers engaging in targeting must be able to set different terms for targeted customers than other customers."); *2010 Horizontal Merger Guidelines*, § 3, 6 ("When examining possible adverse competitive effects from a merger, the Agencies consider whether those effects vary significantly for different customers purchasing the same or similar products. Such differential impacts are possible when sellers can discriminate, e.g., by profitably raising price to certain targeted customers but not to others.").

contrast to the JV's package, which I have shown in Figure 16 in Section II.B.1, contains many networks on which live sports is the minority of their programming.

(154) Consumers' desired share (and level) of sports programming (and live sports programming) in their pay TV packages no doubt lies on a continuum. Some consumers may want as many channels that have live sports as possible and no channels that have no live sports. But others may not want to subscribe to packages that have channels with only a small share of programming that is live sports. Still others may want more non-sports programming than the JV offers. Moreover, in this context a "consumer" is often a household of multiple viewers, so the desired level of sports programming in many cases is an aggregation of multiple viewer's preferences.

(155) If Mr. Orszag intends to include only packages that match exactly the JV's sports, live sports, and non-sports content in his skinny sports bundle market (as it appears to be the case given his omission of vMVPDs, SVODs, and sports DTC services) that very, very narrow set of products is likely to face significant competitive constraints from the many other services that contain live sports.

(156) Indeed, as I noted in Section II.C, evidence from the JV members' ordinary course documents analyzing the JV's likely subscribership and its sources indicates that, while it is targeted to customers outside the pay TV (vMVPD and MVPD) ecosystem, [redacted][269]

(157) In fact, Fubo's primary claim of harm is that the JV will draw subscribers away from Fubo (a vMVPD), indicating that Fubo believes that consumers will significantly substitute between the JV's "skinny sports bundle" and vMVPD packages. But, if so, that is an indication that "skinny sports bundles" are unlikely to be a relevant market of their own.[270]

(158) The second element in Mr. Orszag's argument consists of quotes from Disney CEO Bob Iger, Fox CEO Lachlan Murdoch, and Fubo COO Alberto Horihuela describing the uniqueness of the JV.[271] These quotes are not supportive of Mr. Orszag's claims. While Mr. Iger discusses consumers who want sports-centric content, he explicitly notes that the JV will capture customers from MVPDs.[272]

[269] *See*, *e.g.*, FOX-057328, at -346; TWDC_FUBO_00123219, at -224; WBD-00023204, at -209.

[270] Mr. Orszag attempts in his Updated Declaration to avoid this conclusion by noting that "the diversion ratio (*i.e.*, the degree to which subscribers substitute) from Raptor to Fubo may be significantly smaller than the diversion ratio from Fubo to Raptor." Updated Orszag Declaration, ¶ 29, n. 23. While true as a theoretical possibility, Mr. Orszag offers no evidence that it is true in fact, and the strong presumption would be that it is not to any degree sufficient to undermine the implication that skinny sports bundles are not a relevant market.

[271] Updated Orszag Declaration, ¶¶ 64–67.

[272] Updated Orszag Declaration, ¶ 64 ("Disney CEO Bob Iger stated that Raptor would target 'consumers looking for a seamless way to access an aggregated collection of sports-centric content, including capturing fans moving away from the full cable and satellite bundle.'").

Mr. Murdoch's quote does not mention sports content at all.[273] The first of two quotes from Mr. Horihuela focuses on how consumers who are using free trial subscriptions behave—in contrast, for the hypothetical monopolist test, one would want to focus on how consumers respond overall to regular subscription price changes.[274] The second quote notes that consumers ending Fubo subscriptions switch to other vMVPDs, without saying anything about whether those vMVPDs have a high share of *sports* content.[275] It therefore does not support Mr. Orszag's claim about a "skinny sports bundle" market because it says nothing about whether consumers are leaving Fubo to obtain sports content elsewhere.

(159) The third element in Mr. Orszag's argument for a skinny sports bundle market involves citations to planning documents for the JV and two possible alternative JVs that were considered by the JV members. Those documents discuss pricing of the JV, and Mr. Orszag asserts that they amount to an implementation of the hypothetical monopolist test. I disagree.

(160) In Figure 5 of his Updated Declaration, Mr. Orszag shows [redacted] He notes that [redacted][276]

(161) Normally, even in the most stringent applications of the hypothetical monopolist test, the benchmark price is at least a competitive price, which would naturally entail a price at which a standalone hypothetical monopolist would at least break even. [redacted] Mr. Orszag attempts to get around this point by arguing that [redacted] This is incorrect, [redacted] Just as with the current JV, [redacted]

[273] Updated Orszag Declaration, ¶ 65 ("Mr. Murdoch similarly stated that Raptor 'is focused entirely on cord—not cord-cutters, but cord-nevers…And so the target for this product…is really that universe of, call it, 60 million-odd households that currently don't participate in the bundled cable and pay television ecosystem.'").

[274] Updated Orszag Declaration, ¶ 67 ("For example, Fubo COO Alberto Horihuela, explained that Fubo's number of free-trial subscribers increases sharply with the occurrence of popular sporting events, and reaches its annual peak in the fall months when the college and professional football seasons begin, suggesting that such customers are most focused on watching sports programming.").

[275] Updated Orszag Declaration, ¶ 67 ("Horihuela also stated that '[w]hen Fubo customers end their subscriptions, the vast majority will either switch to another live TV streaming service like Fubo, or will simply stop subscribing to a live TV service altogether (often temporarily, in between sports seasons), suggesting that such customers are most focused on watching sports programming'").

[276] Updated Orszag Declaration, ¶ 70.

[redacted][277] [redacted][278]

(162) Mr. Orszag also asserts that [redacted][279] Yet Mr. Orszag ignores that [redacted][280]

III.C. The JV is more properly analyzed within a market for all video distribution services

(163) As the discussion in Section III.B indicates, the packages offered by various MVPDs, vMVPDs, SVODs, and DTC services are highly varied, as is the programming desired by different consumers. Consumers vary in the amounts of live sports and non-sports that they wish to consume and frequently also combine the services of many providers to achieve their desired collection of programming. A proper analysis of the sale of video distribution services therefore needs to consider all these possibilities without arbitrarily ignoring or improperly excluding important alternatives for consumers.

(164) Within these various video distribution services the JV offers programming that is more sports-focused than the more comprehensive bundles offered by MVPDs and vMVPDs but is less sports-focused and more comprehensive than many current DTC streaming offerings, especially those offered by sports leagues. And, going forward, the number and variety of these sports DTC offerings are likely to continue growing. Moreover, consumers can also combine these very sports-focused DTC offerings with SVOD offerings that are less sports-focused but also include sports to achieve

[277] FOX-043715, at -721. Remarkably, Mr. Orszag notes in a footnote [redacted] Updated Orszag Declaration, ¶ 70, n. 93.

[278] A similar point applies to Mr. Orszag's footnoted discussion [redacted] (Updated Orszag Declaration, ¶ 70, n. 95) as well as his discussion of a document created by WBD (FOX-009873) that contains [redacted] (Updated Orszag Declaration, ¶ 71). In fact, the document explicitly shows the [redacted]

[279] Updated Orszag Declaration, ¶ 71.

[280] FOX-057328, at -343–344. The same document at -329 states that [redacted]

their desired balance between sports and non-sports video, as the evidence I discussed in Section III.B showed.

(165) Any market definition that ignores or obscures these basic competitive facts, as is the case with all three of Mr. Orszag's proposed markets for the sale of pay TV services to consumers, is likely to be highly misleading.

(166) A focus on all video distribution services considers all of these different alternatives available to and often chosen by consumers.[281]

III.D. Mr. Orszag's proposed market for the sale of sports network programming to vMVPDs and MVPDs is flawed as a basis for his analysis of the JV members' market power

(167) Mr. Orszag also asserts that there is a relevant market for the sale of sports network programming (specifically, of "channels that contain live sports programming") to vMVPDs and MVPDs.[282]

(168) His argument and the evidence he cites in support of this relevant market are flawed. First, Mr. Orszag completely ignores the need to establish closeness of substitution for the products in this claimed market (see paragraph (105) above). Second, Mr. Orszag ignores important constraints on the fees that a hypothetical monopolist of networks that contain live sports programming can charge to vMVPDs and MVPDs.

III.D.1. Mr. Orszag fails to recognize whether and the extent to which different networks that carry sports content are close substitutes for each other

(169) As I noted above, for a set of products to pass the hypothetical monopolist test requires both that products outside of the proposed market are relatively distant substitutes for products in the market, and that the products in the market are significant substitutes for one another. If the second of these conditions is not met, then a hypothetical monopolist would not find it profitable to increase prices above their current levels.

(170) Mr. Orszag fails to consider at all the second of these requirements. This failure matters because, as I discuss in Section IV.A, Mr. Orszag analogizes the JV to a horizontal merger of the JV members; one

[281] I also note, as I did in footnote 195, that the DOJ proposed exactly this relevant market in the AT&T-Time Warner merger case. *AT&T Inc.*, 310 F. Supp. 3d, at 195–196 ("The Government's primary product market is the market for multichannel video distribution. Multichannel video distribution, as defined by the Government, involves the distribution of live, or "linear," video programming networks, as well as on-demand content, to subscribing consumers... As relevant here, the sellers in that product market are: 1) MVPDs... and 2) virtual MVPDs...") (emphasis in original).

[282] Updated Orszag Declaration, ¶ 31.

of several flaws in this analogy is that a horizontal merger among products that are not significant substitutes would not lead to significant price increases.

(171) There are many reasons to think that the different networks that carry live sports are not particularly close substitutes for one another.

(172) First, the networks that carry live sports programming vary significantly in the share of their programming that is live sports. If live sports programming is differentiated significantly from other programming for vMVPDs and MVPDs, as Mr. Orszag claims, then these different networks will also be significantly differentiated. In Figure 34, I show [redacted]

[redacted]

(173) Figure 35 restricts attention to the channels that Mr. Orszag identifies as sports networks and shows the share of program hours for each channel that is live sports events, other sports telecasts, and non-sports programming.[283] [redacted]

[283] Figure 34 contains [redacted] In contrast, in his Figure 7, Mr. Orszag identifies sports networks using network genre found in S&P Global. Limiting to networks labeled as sports in S&P Global excludes networks that have primarily non-sports content but telecast live sports events. For example, the major broadcast channels (ABC, CBS, FOX, NBC, the CW) all telecast live sports, but since most of their programming is non-sports content, they are categorized as general variety according to S&P Global. Figure 35 contains the networks identified in Mr. Orszag's Figure 7 and the JV networks. Updated Orszag Declaration, Figure 7: Subscribership for JV Networks and Other Sports Networks 2023.

[redacted]

(174) Figure 36 shows this same breakdown for Fubo's top 50 networks. [redacted]

[redacted]

(175) Second, even if two networks carry *only* live sports, substitution by vMVPDs and MVPDs between them would likely be limited. Sports networks have value because they offer consumers convenient access to a variety of sports events. However, these events differ in the nature of the game being played, the season in which they are played, and the day and time of the events.

(176) For example, as shown in Figure 37, the seasons of most of the major sports do not overlap significantly. As a result, even a viewer who enjoys both basketball and baseball generally would not consider NBA programming and MLB programming to be substitutes most of the year, because at most times of the year only one or the other is showing. And of course, an avid basketball fan who does not care for baseball (or vice versa) would not view these as substitutes at any time.

Figure 37. Seasons of major sports leagues generally do not overlap

Sport	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
NFL	Playoffs								Regular Season			
MAJOR LEAGUE BASEBALL			Regular season							Playoffs		
NBA	Regular season			Playoffs							Regular season	
NHL	Regular season			Playoffs							Regular season	
MLS		Regular season									Playoffs	

Source: "When Do Major Sports Seasons Start and End?" Circa Sports, November 2, 2021, https://www.circalasvegas.com/blog/major-sports-seasons-start-end/; "Audi 2023 MLS Cup Playoffs: What should you know?" MLS, October 17, 2023, https://www.mlssoccer.com/news/audi-2023-mls-cup-playoffs-what-should-you-know; "2024 NBA Playoff Bracket: Updated schedule, scores, standings," Fox Sports, updated June 18, 2024, https://www.foxsports.com/stories/nba/nba-playoff-picture-bracket.
Notes: This schedule serves as an approximation of a year in sports for select US sports leagues. Leagues' start and end dates vary from year to year based on many variables such as the day of the week and playoff outcomes.

(177) An August 2023 Fox presentation titled "Project Zenith Research Overview" similarly highlights [redacted][284] Figure 38 reproduces a slide from this presentation.

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284 [redacted] FOX-043715, at -725.

[redacted]

(178) Moreover, vMVPDs' and MVPDs' demand for sports programming stems largely from consumers' preferences. Consumers tend to prefer particular sports, and do not have equally strong preferences for all programming that fits into the broad category of "sports." Evidence on consumer viewership patterns, for example, shows low overlap of viewers across different sports that have overlapping seasons. For example, as Figure 39 shows, only 26% of basketball-watching households watch ice hockey. Only 27% of baseball-watching households watch golf, and only 19% watch tennis.

Figure 39. Share of big five sports watchers who also watch other sports, Q3 2023

Sports viewed	Population					
	Total respondents	Football viewing households	Baseball viewing households	Basketball viewing households	Ice Hockey viewing households	Soccer viewing households
Football	**52%**	100%	83%	84%	81%	68%
Baseball	**32%**	51%	100%	56%	64%	50%
Basketball	**30%**	48%	53%	100%	49%	54%
Ice hockey	**16%**	24%	31%	26%	100%	29%
Soccer	**15%**	19%	23%	27%	27%	100%
Golf	**14%**	22%	27%	24%	28%	23%
Tennis	**11%**	16%	19%	21%	22%	27%
Combat sports	**10%**	15%	14%	18%	15%	19%
Motorsports	**9%**	12%	13%	11%	19%	14%
Professional wrestling	**8%**	11%	11%	13%	12%	13%
Cricket	**2%**	1%	2%	2%	3%	5%
None of the above	**30%**	0%	0%	0%	0%	0%

Source: S&P Global Market Intelligence, "Sports Viewer Crosstab, Q3 2023," Capital IQ Pro, accessed July 3, 2024.
Notes: Answers to "Please indicate which types of sports you or someone in your household typically watch or plan to watch" among a sample of 1,886 sports viewing households. Limited to the top five most popular sports.

(179) Even *within* a given sport, different events may not be substitutes for each other. Games within a particular sports league are often spaced across different days or times within the same day during the regular season. For example, the NFL not only spaces games across different days and times, but also across programmers. Figure 40 shows the NFL schedule during the week of October 23, 2023. Games are on Monday night (ABC/ESPN), Thursday night (Amazon Prime Video), Sunday early afternoon (Fox and CBS), Sunday late afternoon (CBS), and Sunday night (NBC). Comparable spacing exists for NBA and MLB games. See Figure 57 and Figure 58 in Appendix C.

Figure 40. The NFL spaces games across different days and times, week of October 23, 2023

Day	1:00 PM	2:00 PM	3:00 PM	4:00 PM	5:00 PM	6:00 PM	7:00 PM	8:00 PM	9:00 PM	10:00 PM	11:00 PM
Mon.								MNF on ABC/ESPN (49ers v. Vikings)			
Tue.											
Wed.											
Thr.								TNF on Amazon Prime (Buccaneers v. Bills)			
Fri.											
Sat.											
Sun.	NFC regional game on Fox AFC regional game #1 on CBS			AFC regional game #2 on CBS				SNF on NBC (Bears v. Chargers)			

Source: Meredith Gordon and Fox Van Allen, "How to Watch Tonight's San Francisco 49ers vs. Minnesota Vikings Game on Monday Night Football," *CBS*, October 23, 2023, https://www.cbsnews.com/essentials/how-to-watch-the-san-francisco-49ers-vs-minnesota-vikings-game-2023-10-23; "NFL TV Schedule and Maps: Week 8, 2023," 506 Sports, October 29, 2023, https://506sports.com/nfl.php?yr=2023&wk=8.
Note: The schedule is from the perspective of the generic viewer who has access to ABC, Amazon Prime Video, Fox, CBS, and NBC. Fox and CBS select which game will be available to the viewer based on the viewer's local market during each of their time slots. Each broadcaster makes one game available during each of their respective slots. Fox broadcasted six regional NFC games at 1:00 PM on Sunday, while CBS broadcasted four regional AFC games at 1:00 PM and three regional AFC games at around 4:00 PM on Sunday. CBS and Fox carry the AFC and NFC teams, respectively. The conference of the away team generally determines the broadcaster of an inter-conference game.

(180) Many consumers no doubt want to watch NFL games *both* on Sunday *and* on Monday night. Many others may be able to watch only on Monday night but not on the weekend, or the reverse. In all three of these cases, Sunday night games and Monday night games are not substitutes for each other. In fact, in the former case, they may well be *complements* from the standpoint of a vMVPD or MVPD.[285]

(181) Consistent with this observation, leagues often split up the licensing of their games among several different networks. For example, Figure 25 in Section III.B.1 shows the division of telecast rights for NFL games.[286] If dividing their rights in this way created a lot of profit-reducing competition among the programmers showing those events (because they are strong substitutes), the leagues would not want to do so.

(182) Lastly, and importantly, vMVPDs and MVPDs—including Fubo—offer a bundle of programming (with a variety of sports programming) precisely because the bundle can be worth more than the sum of its parts. Consumers may want to watch sports events (whether of the same sport or different ones) that are shown by different networks and may value having them all offered on one video service. This means not only that these networks may not be significant substitutes for each other, but also

[285] According to B. Douglas Bernheim and Michael D. Whinston *Microeconomics*, 2nd ed. (New York: McGraw-Hill/Irwin, 2014), 26, two products are complements if, "all else equal, an increase in the price of a complement causes buyers to demand less of the other product." Complementarity tends to arise when acquisition of one product increases the incremental value of having the other.

[286] Figures illustrating the division of rights for other sports are in Appendix C.

that they may have a significant element of *complementarity* for vMVPDs and MVPDs that want to put together attractive packages of programming.

(183) The fact that most MVPDs and vMVPDs carry the sports programming of all three of the JV members' is evidence consistent with the lack of close substitution from the perspective of MVPDs and vMVPDs.

(184) Lack of close substitution is also consistent with the evidence of Fubo's apparent interest in becoming a "super aggregator" of DTC channels offered by programmers in order to become a "one-stop shop" for consumers. Being a one-stop-shop is desirable when networks or other video offerings are complements because consumers will view the whole as worth more than the sum of the parts. Some of that evidence I cited in paragraph (119) above; other evidence includes:

- During a November 2023 earnings call, Fubo's CEO, David Gandler, stated that "Fubo's goal is to be a super aggregator, and we are well on our way."[287]
- During a March 2024 earnings call, Fubo's CEO, David Gandler, stated that "one of [Fubo's] key goals as part of being a video aggregator is to really drive a super aggregation strategy."[288]
- During a May 2024 company conference presentation, Fubo's CEO, David Gandler, stated that "[Fubo is] an aggregator. We don't really focus on exclusivity."[289]

III.D.2. Mr. Orszag ignores important competitive constraints on sports network fees

(185) Mr. Orszag argues that sports network programming is a "must have" for downstream programmers, an assertion that he claims is supported by the fact that fees for networks that offer live sports are higher than for those that do not.

(186) However, Mr. Orszag fails to consider several important constraints on the fees a hypothetical monopolist of sports network programming would face.

III.D.2.a. vMVPDs and MVPDs can substitute to greater reliance on non-sports programming in their packages in response to fee increases for sports channels

(187) vMVPDs and MVPDs offer a combination of sports and non-sports networks in the various packages they sell to consumers. This combination is meant to appeal to consumers, who vary in the balance they desire between these types of programming. An increase in the fee demanded for a sports

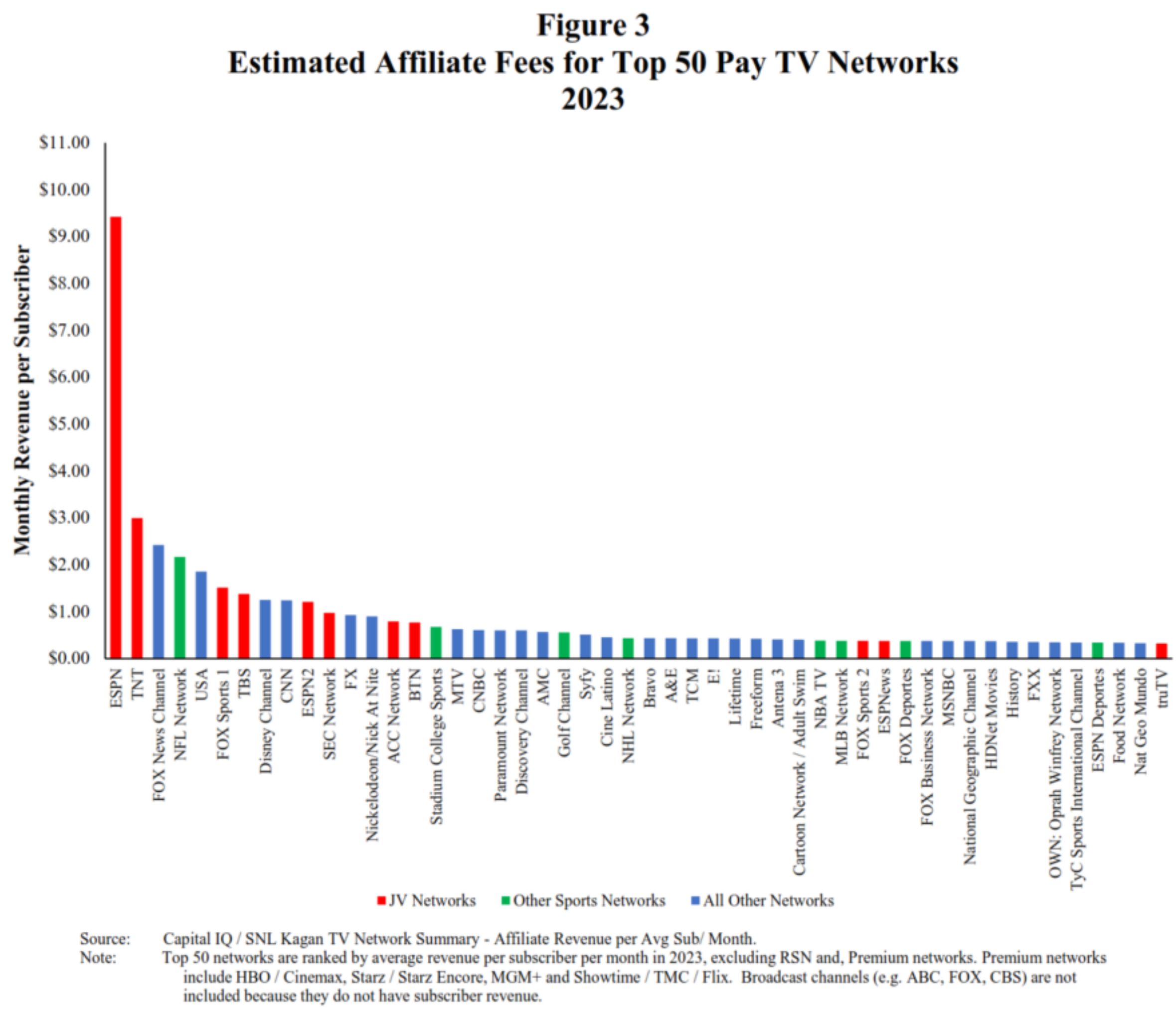
287 FuboTV Inc., "FQ3 2023 Earnings Call Transcripts," *S&P Global Market Intelligence*, November 3, 2023.
288 FuboTV Inc., "FQ4 2023 Earnings Call Transcripts," *S&P Global Market Intelligence*, March 1, 2024.
289 FuboTV Inc., "Company Conference Presentation," *S&P Global Market Intelligence*, May 20, 2024.

network makes it more likely that a distributor will decide not to carry that network in its channel lineups or include it only in one of the more expensive packages it offers.

(188) This possibility is especially salient for the many networks that offer some—but not a lot of—sports programming. Recall from Figure 34, Figure 35, and Figure 36, for example, that Mr. Orszag's "sports networks" vary considerably in the amount of sports that they show. Indeed, many of Mr. Orszag's "sports networks" show very little sports. For these networks, other networks showing no sports can be a very close substitute for a vMVPD or MVPD as their carriage has little effect on the overall level of sports in the vMVPD's or MVPD's packages.

(189) Moreover, many networks that show no sports, such as Fox News, command fees that exceed those of many networks that Mr. Orszag identifies as sports programming networks, indicating that they have significant ability to draw subscribers to a vMVPD or MVPD. Figure 41 is a screenshot of Mr. Orszag's Figure 3, which shows estimated affiliate fees for the top 50 cable networks.

Figure 41. Mr. Orszag's Figure 3



Source: Updated Orszag Declaration, Figure 3.

III.D.2.b. vMVPDs and MVPDs have increasing access to live sports from sources other than "sports networks"

(190) In Figure 43 in Section IV.A.4, I showed how the sports rights currently contracted by various entities expire over time. As these rights expire, vMVPDs and MVPDs have the ability to bid to acquire these rights directly from sports leagues rather than license sports network programming. This is exactly what various SVODs, including new direct buyers of sport rights such as Amazon and Apple, have done.

III.D.2.c. Consumer substitution to the growing alternatives to vMVPDs and MVPDs constrain network sports programming fees to vMVPDs and MVPDs

(191) As I discussed in Section III.B, consumers have a growing number of alternatives to obtaining sports programming through vMVPDs and MVPDs. Consumers can watch sports programming, in some cases the exact same sports programming available through vMVPDs and MVPDs, through SVODs and sports-centric DTC services.

(192) This downstream competition faced by vMVPDs and MVPDs has important implications for whether a hypothetical monopolist of sports programming would find an increase in the fees it charges to vMVPDs and MVPDs profitable.

(193) Increases in the fees paid by vMVPDs and MVPDs may be passed through to consumers by vMVPDs and MVPDs in the form of higher prices to consumers for their packages. Because consumers have important SVOD and DTC streaming alternatives to vMVPDs and MVPDs, these higher package prices would lead consumers to substitute away from vMVPD and MVPD packages, reducing the number of subscribers for the hypothetical monopolist's sports networks—and hence, the fees it earns. Such substitution reduces the profitability of any upstream fee increase.[290] Indeed, Mr. Orszag cites exactly the threat of reductions in subscribership as the first factor that constrains the affiliate fees charged by networks to vMVPDs and MVPDs.[291]

(194) As I described in Section III.B, the number of such alternatives and their subscribership have been increasing dramatically over time and are highly likely to continue to increase rapidly because of the ease of entry and because existing sports rights held by sports network programming suppliers will expire.

290 [redacted] *See, e.g.*, D. Fox Deposition, 281:13–20 [redacted] Iger Deposition, 79:21–80:12 [redacted]

291 Updated Orszag Declaration, ¶¶ 109–110.

IV. The evidence does not indicate that the JV will harm competition in the licensing of sports network programming to vMVPDs and MVPDs

(195) Antitrust economics, and to my understanding antitrust law as well, focuses on harm to competition, not harm to particular competitors. Therefore, the relevant economic question is not whether the JV is good or fair to Fubo; the question is whether it is good for consumers. As I discuss here and address more fully in Section V, the JV benefits consumers through more consumer choice and lower prices, resulting in increased output (e.g., the provision of extensive linear TV content to consumers who currently get none).

(196) Mr. Orszag nonetheless claims that the JV is overall *anti*competitive, and asserts that the JV will harm competition in the following ways:

1. The JV will enhance the market power of defendants in the alleged market for the licensing of sports programming to vMVPDs and MVPDs.[292]
2. The creation of the JV would give each member an increased unilateral incentive to raise the prices of its sports network programming to rival vMVPDs and MVPDs, thus harming downstream competition.[293]

(197) The first is a *horizontal* claim about the JV increasing the *joint* market power of the defendants in the alleged market for sports network programming licensed to vMVPDs and MVPDs. The second is instead a *vertical* claim that argues that each JV member would have an increased unilateral incentive to raise the prices of this programming to MVPDs and vMVPDs due to the creation of the JV.

(198) In this section, I discuss each avenue for harm in turn, and why Mr. Orszag's concerns are supported by neither economic theory nor evidence. In Section IV.A, I discuss the horizontal claim, while in Section IV.B, I discuss the vertical claim.

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292 *See* Updated Orszag Declaration § II.D ("THE JV WILL ENHANCE THE MARKET POWER OF DEFENDANTS IN THE MARKET FOR THE SALE OF SPORTS PROGRAMMING TO VMVPDS AND MVPDS").

293 *See* Updated Orszag Declaration, ¶¶ 109, 112. ("Today, the Defendants' unilateral incentives to increase the affiliate fees they charge to MVPDs and vMVPDs are constrained by at least two effects… Following the launch of Raptor, both effects would be weakened.") The effects he considers here are vertical foreclosure/raising rivals' costs effects.

IV.A. The JV will not change the market power of the defendants in any properly defined market for the licensing of sports networks to vMVPDs and MVPDs

IV.A.1. The JV is not a merger and should not be analyzed as one

(199) Mr. Orszag analyzes the JV's competition effects in part by treating it as a full merger of Disney, Fox, and WBD in the licensing of sports network programming to vMVPDs and MVPDs.[294] Specifically, he asserts that "Raptor changes the incentives and market power of Defendants in the licensing of sports programming content to vMVPDs and MVPDs in ways that are analogous to a merger of Defendants in the sales of sports programming."[295] Mr. Orszag uses his argued equivalency between the proposed JV and a full merger to justify a competitive analysis that combines the three JV members' market shares in his alleged sports network programming market, using the methodology described in the 2010 Horizontal Merger Guidelines.[296] He concludes from this analysis that the change in concentration that would result from a full merger of the JV members, as measured by the Hirschman-Herfindahl index ("HHI"),[297] means that the proposed JV is "presumed to substantially increase the market power of the JV members."[298]

(200) To start, I note that the facts that different sports networks are not necessarily close substitutes and that even a hypothetical monopolist would face important constraints on its pricing to vMVPDs and MVPDs (as I discussed in Section III.D) imply that even if the JV *were* analogous to a horizontal merger, it would not necessarily lead to market power or any significant increase in fees to vMVPDs and MVPDs.

(201) But, leaving that point aside, Mr. Orszag's approach wrongly assumes a wholly different transaction than the one at issue. The JV creates a new downstream distributor that offers subscribers non-exclusive content from each of the JV members, but does not otherwise combine the operations of the JV members in their roles as programming *licensors* (again, the JV members' licensing of their networks to the JV is non-exclusive and they will not change the current distribution of those

294 *See* Updated Orszag Declaration, ¶¶ 74–92. I will sometimes refer to this as a "sports network programming" market.

295 Updated Orszag Declaration, ¶ 74.

296 *See 2010 Horizontal Merger Guidelines*, August 19, 2010, §§ 5.2–5.3.

297 *See 2023 Merger Guidelines*, 5 ("The Agencies generally measure concentration levels using the Herfindahl-Hirschman Index ("HHI"). The HHI is defined as the sum of the squares of the market shares; it is small when there are many small firms and grows larger as the market becomes more concentrated, reaching 10,000 in a market with a single firm.").

298 Updated Orszag Declaration, ¶ 84 ("Because the post-JV HHIs are above 2,500 and the change in HHI is well above 200 (whether or not RSNs are part of the market), the 2010 Horizontal Merger Guidelines indicate that the proposed JV is presumed to substantially increase the market power of the JV members."); Updated Orszag Declaration, ¶¶ 90–91, ("My analysis shows that the JV will increase the HHI by between 1,800 (if RSNs are included in the market) and 2,300 (if RSNs are excluded from the market). As with the sports viewership-based HHIs discussed above, these levels and changes of the HHI would lead the DOJ to conclude that there is a presumption that the JV would enhance market power.").

networks to the many other distributors), or meaningfully change the economic interests of the JV members to compete with one another for the licensing of their sports network programming, let alone eliminate them, as a merger would.

(202) In this section, I explain why Mr. Orszag's approach is conceptually flawed. I also explain why, even if he were correct in this approach (which he is not), Mr. Orszag overstates the joint market share of the JV members.

(203) Mr. Orszag gives two reasons for his conclusion that the JV is analogous to a horizontal merger. The first is that "Raptor will change the incentives of each member of the JV to increase the price of their sports programming to MVPDs."[299] This claim is the second claim I described above in paragraph (196). It is a *vertical* claim—specifically, a claim that the JV increases the incentives of each JV member to *individually* raise prices to third-party MVPDs and vMVPDs. In Section IV.B, I discuss in detail why this concern is unjustified. For present purposes, the salient point is that this concern (even if it were substantiated, which it is not) provides no basis for analyzing the JV as if it were a *horizontal* merger.

(204) Mr. Orszag's second reason gives is that "Raptor will align the interests of the Defendants."[300] In the remainder of this subsection, I explain why this claim is incorrect: The JV leads to *no change at all* in the economic interests of each of the JV members: both before and after the formation of the JV, each JV member cares only about its own profits, in marked contrast to the change in economic interests that accompanies a merger.[301]

(205) To understand this point, it is useful to consider ways in which sports network programmers compete with one another. At a high level, sports network programmers may compete with one another at three different levels of the supply chain:

1. Downstream, for viewership
2. Upstream from that, for carriage on a particular distributor, and
3. Upstream from that, for the right to broadcast particular live sports events.

(206) In each case, the JV does not meaningfully change the economic interests of its members when competing with one another, as both before and after formation of the JV, each member seeks to

[299] Updated Orszag Declaration, ¶ 73.

[300] Updated Orszag Declaration, ¶ 74.

[301] The joint DOJ/FTC *Antitrust Guidelines for Collaborations Among Competitors*, which I discuss in Section IV.A.2, also notes this important difference: "The competitive effects from competitor collaborations may differ from those of mergers due to a number of factors. Most mergers completely end competition between the merging parties in the relevant market(s). By contrast, most competitor collaborations preserve some form of competition among the participants." US Department of Justice and Federal Trade Commission, *Antitrust Guidelines for Collaborations Among Competitors*, April, 2000, [hereinafter *"Competitor Collaboration Guidelines"*], 5.

maximize only its own profit. In marked contrast, a merger *eliminates* competition between the merger partners and aligns the economic interests of each partner with the overall profitability of the combined entity.

IV.A.1.a. Competition for viewership

(207) Programmers, including programmers whose networks include sports content, compete downstream for viewership, at a high level, by improving the quality of their programming to make it more attractive to viewers. When it comes to sports specifically, programmers can improve the sports content offered by their networks in two primary ways: (i) by acquiring the rights to broadcast sports events, and (ii) by creating and improving content within and around that sports programming. That latter method can include, for example, within-game production and commentary, or related programming such as sports talk shows or highlight shows.[302] These improvements can increase viewership on a programmer's network, which translates into greater revenue through higher affiliate fees (because distributors will be willing to pay more for access to the network if viewers value it more highly) and more advertising revenue (because advertisers will be willing to pay more for an ad on a network with higher viewership).

(208) The JV does not change any JV member's economic interest in achieving viewership gains in these ways. Consider, for example, Disney's economic interests in improving ESPN programming before and after the creation of the JV. In each case, a viewer switching from, say, Fox Sports programming to ESPN programming, yields increased profits to ESPN (through the ability to obtain higher affiliate fees and more advertising revenue from both the JV and other distributors) and lost profits to Fox. Before the creation of the JV, Disney values $1 of additional ESPN profits at $1. In contrast, Disney does not care about the reduction in Fox Sports's profits as a result of the switch. After the JV begins to operate, Disney's economic interests are no different: $1 in additional ESPN profits generated by a viewer switching from Fox Sports programming to ESPN programming is given full weight, while the associated loss of profits to Fox is given no weight by Disney.

(209) These economic interests apply even within the JV itself. [redacted][303] [redacted]

[302] Examples of such programming include "Sports Center" on ESPN, "Undisputed" on Fox, and "Inside the NBA" on TNT. See Section II.A.3.

[303] TWDC_FUBO_00079295, at -301, -302. In a September 21, 2023 email, James Pitaro, Chairman of ESPN, wrote that the JV is [redacted] TWDC_FUBO_00104131, at -132; *See also* WBD-00021826, at -826, a September 26, 2023 email from Luis Silberwasser, Chairman and CEO of WBD Sports, to executives at WBD [redacted] These documents are consistent with JV member financial models that show [redacted] *See, e.g.,* TWDC_FUBO_00123219, at -223; WBD-00023204, at -207.

[redacted][304] [redacted][305]

(210) Contrast this calculation with the change in economic interests that would occur after a hypothetical merger of the sports channels of Fox, Disney, and WBD. In the case of such a merger, joint ownership of all their channels would mean that the merged entity would give equal weight to any gain in profits from ESPN and any loss in profits to Fox resulting from a shift in viewers from Fox to ESPN. This change in economic interests would reduce (and, in the case of fully offsetting profit effects contemplated above, completely eliminate) the incentive of ESPN to improve its sports

[304] D. Fox Deposition, 190:7–191:1 [redacted] Warbrooke Deposition, 98:20–99:3 [redacted] *See also* Warbrooke Deposition, 210:13–21 [redacted] Pitaro Deposition, 127:18–128:8 [redacted]

[305] [redacted] TWDC_FUBO_00079295, at -300. However, my understanding is that the JV plans to operate [redacted] In a September 21, 2023 email, James Pitaro, Chairman of ESPN, wrote that the JV is [redacted] TWDC_FUBO_00104131, at -132; *See also* WBD-00021826, at -826, a September 26, 2023 email from Luis Silberwasser, Chairman and CEO of WBD Sports, to executives at WBD [redacted]; These documents are consistent with JV member financial models that show [redacted] *See, e.g.*, TWDC_FUBO_00123219, at -223; WBD-00023204, at -207. This choice may reflect the fact that the JV members' content contributions to the JV are very dissimilar; [redacted] In an October 12, 2023, email to Chara-Lynn Aguiar, EVP at Disney, Justin Warbrooke, Head of Global Direct-to-Consumer Strategy at Disney, wrote [redacted] TWDC_FUBO_00066919, at -920. [redacted]

programming to steal viewers from Fox or WBD. In stark contrast, the JV causes no meaningful change in economic interests that could reduce the investment incentives of the JV members as they are each still competing for viewership both within the JV and within third-party distributors' platforms.[306]

IV.A.1.b. Competition for carriage

(211) A second form of competition between sports network programmers comes in their efforts to secure carriage of their networks by distributors.[307] By securing distribution for a network, a programmer acquires the ability to earn affiliate fees when viewers subscribe to packages that include the network and likely also increases the network's viewership, leading to increases in advertising revenues.

(212) As a starting point, competition for carriage among the JV members can only occur when a distributor is not carrying at least one of them, and so can play them off against each other. The vast majority of MVPDs and vMVPDs carry the sports programming of all three of the JV members (Fubo is an exception).

(213) This fact is perhaps not surprising given the complementary nature of various sports. As I discussed in Section III.D.1 above, differences in sports content (and associated viewer interest), in the seasons various sports are played, and in the days and times sports are played even when seasons overlap, mean that sports programs are not necessarily close substitutes to one another.

(214) However, even if there is some competition among the JV members for carriage, the point remains that formation of the JV in no sense aligns the economic interests of the JV members in this competition. The reason parallels the logic described in Section IV.A.1.a above: Prior to the creation of the JV, if for example, Disney and Fox compete for carriage, the winner internalizes the additional profits obtained from winning the competition, and ignores profits lost by the competing entity. After the JV, these competitive interests are unchanged, since Disney does not share in Fox's profits after the JV, and vice-versa.

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306 Here I focus on incentives arising from viewership changes within a distributor. The launching of the JV will likely shift the set of viewers at each distributor. This may cause some change in the incentives to invest in quality, but whether it would raise it or lower it is unclear and depends on the exact ways in which these sets of viewers change at each distributor. Incentives to invest in quality are, however, likely to stem primarily from the effects of viewership shifts within each distributor (since the most important channels are carried by all distributors, a change in a channel's quality is unlikely to induce significant shifts of viewers across distributors, and—even if it did—the channel's earnings may not differ significantly across distributors). Moreover, whether formation of the JV increases or decreases the quality incentives arising from such shifts is unclear. Most importantly, as I discuss in the text, each JV member's incentives will still be affected only by *its own* affiliate fees and advertising revenue, in contrast to the case of a horizontal merger.

307 Programmers may also compete for other viewership-enhancements, such as desirable placement in a distributor's channel lineup.

(215) Again, it is useful to contrast this situation with the change in economic interests that would result from a horizontal merger.[308] If Disney and Fox's sports networks were to merge, a combined entity controlling both sets of sports networks would never compete against itself. For example, if Fubo does now play the JV members off against each other as Mr. Orszag asserts, after a horizontal merger it would be completely unable to do so.[309] In contrast, Fubo's ability to do so after formation of the JV would not change at all.

IV.A.1.c. Competition for sports licensing rights

(216) As discussed in Section II.A.2.a and Section II.A.3 above, the sports that are shown by sports network programmers are generally not owned by the programmers. Instead, programmers bid against one another for the rights to broadcast particular sports. The underlying content is owned by others, generally the sports leagues themselves.[310] In this competition, sports programmers may bid against one another, against downstream distributors, and even, implicitly, against the sports leagues, for the rights to show particular packages of sports on their channels for a limited period of time.[311]

(217) Successfully acquiring sports licensing rights improves the quality of a programmer's sports programming, allowing it to increase its affiliate fees and advertising revenues. As discussed in Section IV.A.1.a above, [redacted] Consequently, [redacted][312] In contrast, if the JV members were to merge, they would internalize all of these changes

[308] *See* Updated Orszag Declaration, ¶ 74 ("[R]aptor changes the incentives and market power of Defendants in the licensing of sports programming content to vMVPDs and MVPDs in ways that are analogous to a merger of Defendants in the sales of Sports programming.").

[309] Updated Orszag Declaration, ¶¶ 111–113 ("Second, currently, the availability of sports programming from multiple Defendants provides some constraint on the ability of any one Defendant to raise affiliate fees to a vMVPD or MVPD. This is because if any individual Defendant unilaterally raised their prices to vMVPDs and MVPDs, each vMVPD/MVPD could play one provider of sports programming off against another in trying to negotiate lower affiliate fees or better terms.").

[310] As I discussed in Section II.A.2, leagues oversee the scheduling, operation of, and sales of the media rights to live sports events. In addition, teams sometimes own media rights to certain of their live sports events and negotiate distribution themselves. The New York Yankees, for example, broadcast the majority of games on the YES Network, a New York RSN which primarily covers Yankees and Brooklyn Nets games, and whose majority stakeholder is the Yankees themselves, but is partially owned by Amazon.

[311] Sports leagues can and do self-distribute their own content, as discussed in Section II.A.4.c above, which impacts the prices a sports league is willing to accept from other bidders.

[312] [redacted] TWDC_FUBO_00079295, at -301, -302; My understanding is that the JV plans [redacted] In a September 21, 2023 email, James Pitaro, Chairman of ESPN, wrote that the JV is [redacted] TWDC_FUBO_00104131, at -132; *See also* WBD-00021826, at -826, a September 26, 2023 email from Luis Silberwasser, Chairman and CEO of WBD Sports, to executives at WBD [redacted]

in profits from bidding for sports rights, and that entity would not compete against itself in such bidding.

IV.A.1.d. Impact on Mr. Orszag's analysis

(218) Mr. Orszag uses his argued equivalency between the proposed JV and a full merger to justify combining the three JV members' market shares in his sports network programming market as part of his competitive analysis. He then bases his claim that the JV would increase the JV members' market power on the change in concentration that would result from a full merger between the JV members.[313]

(219) Mr. Orszag argues that the HHI and change in HHI resulting from a hypothetical merger of the three JV members, with market shares based on either shares of sports viewership or shares of sports rights fees paid, are "well above" the threshold set by the 2010 Horizontal Merger Guidelines for a presumption of harm.[314] Those guidelines note that "mergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power.[315]

(220) In Section IV.A.4, I will explain the ways in which Mr. Orszag overstates the share of each of the JV members (even in his alleged market).

(221) However, as I have explained above, the JV is not at all equivalent, or even meaningfully similar, to a full merger of the JV members' sports assets. Indeed, no sports rights or assets become commonly owned, or change hands in any way, because of the JV. Mr. Orszag's structural analysis thus contributes no useful insight into the competitive impact of the actual transaction.

[redacted] These documents are consistent with JV member financial models that show [redacted] *See, e.g.*, TWDC_FUBO_00123219, at -223; WBD-00023204, at -207.

[313] Updated Orszag Declaration, ¶ 80 ("Economists and regulators often assess the potential anticompetitive harm from a merger, or a similar transaction such as the instant JV, by assessing the market concentration and change in concentration due to the transaction. As a starting place for determining market concentration and market power, economists and regulators often calculate market shares of market participants to assess their competitive significance in that market.").

[314] Updated Orszag Declaration, ¶¶ 83–84, 90–91.

[315] *2010 Horizontal Merger Guidelines*, 19. The 2023 Merger Guidelines include lower thresholds. *2023 Merger Guidelines*, 5 ("Markets with an HHI greater than 1,800 are highly concentrated, and a change of more than 100 points is a significant increase.").

IV.A.2. Economic principles for the analysis of the competitive effects of JVs provide the proper approach for economic analysis of the JV

(222) Because joint ventures among competitors are not horizontal mergers, US antitrust agencies analyze these transactions under set of guidelines specifically tailored for such transactions, rather than the Horizontal Merger Guidelines. The joint DOJ/FTC *Antitrust Guidelines for Collaborations Among Competitors* (henceforth, "*Competitor Collaboration Guidelines*") define a "competitor collaboration" as follows:

> A "competitor collaboration" comprises a set of one or more agreements, other than merger agreements, between or among competitors to engage in economic activity, and the economic activity resulting therefrom. "Competitors" encompasses both actual and potential competitors. Competitor collaborations involve one or more business activities, such as research and development ("R&D"), production, marketing, distribution, sales or purchasing.[316]

(223) The JV at issue falls within this definition of a competitor collaboration since it is an agreement among competitors to create a new joint distributor. The *Competitor Collaboration Guidelines* note that such collaborations "often are not only benign but procompetitive."[317] They also note that, notwithstanding the fact that they are often procompetitive, competitor collaborations can have anticompetitive effects in certain circumstances.[318]

(224) The *Competitor Collaboration Guidelines* list six factors that the agencies examine in a more detailed analysis of possible anticompetitive effects from a collaboration.[319] Examination of these factors may "reduce or increase competitive concern."[320] Each of these factors as applied to the current transaction tend to reduce rather than increase competitive concern. The six factors are:

1. <u>The extent to which the relevant agreement is non-exclusive in that participants are likely to continue to compete independently outside the collaboration in the market in which the collaboration operates</u>:[321] The JV members' sports network programming is not licensed

[316] *Competitor Collaboration Guidelines*, 2.

[317] *Competitor Collaboration Guidelines*, 1. *See also Competitor Collaboration Guidelines*, 23 ("Efficiencies generated through a competitor collaboration can enhance the ability and incentive of the collaboration and its participants to compete, which may result in lower prices, improved quality, enhanced service, or new products.").

[318] *Competitor Collaboration Guidelines*, 6 ("Competitor collaborations may harm competition and consumers by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement….Competitor collaborations also may facilitate explicit or tacit collusion through facilitating practices such as the exchange or disclosure of competitively sensitive information or through increased market concentration.").

[319] *Competitor Collaboration Guidelines*, 19–21.

[320] *Competitor Collaboration Guidelines*, 19.

[321] See the section entitled "Exclusivity" in the *Competitor Collaboration Guidelines*, §3.34(a) ("The Agencies consider

exclusively to the JV. The JV members will continue to offer their sports network programming outside the JV, to many entities that compete with the JV. In addition, as discussed, the JV members will continue to compete independently upstream to acquire sports content.

2. <u>The extent to which participants retain independent control of assets necessary to compete</u>:[322] The JV members each grant non-exclusive access to their sports network programming to the JV, but [redacted][323]

3. <u>The nature and extent of participants' financial interests in the collaboration or in each other</u>:[324] As discussed above, [redacted]

whether, to what extent, and in what manner the relevant agreement permits participants to continue to compete against each other and their collaboration, either through separate, independent business operations or through membership in other collaborations. The Agencies inquire whether a collaboration is non-exclusive in fact as well as in name and consider any costs or other impediments to competing with the collaboration. In assessing exclusivity when an agreement already is in operation, the Agencies examine whether, to what extent, and in what manner participants actually have continued to compete against each other and the collaboration. In general, competitive concern likely is reduced to the extent that participants actually have continued to compete, either through separate, independent business operations or through membership in other collaborations, or are permitted to do so.").

322 See the section entitled "Control over Assets" in the *Competitor Collaboration Guidelines*, §3.34(b) ("The Agencies ask whether the relevant agreement requires participants to contribute to the collaboration significant assets that previously have enabled or likely would enable participants to be effective independent competitors in markets affected by the collaboration. If such resources must be contributed to the collaboration and are specialized in that they cannot readily be replaced, the participants may have lost all or some of their ability to compete against each other and their collaboration, even if they retain the contractual right to do so. In general, the greater the contribution of specialized assets to the collaboration that is required, the less the participants may be relied upon to provide independent competition.").

323 See Section II.B.2.b [redacted] TWDC_FUBO_00083884, at -884.

324 See the section entitled "Financial Interests in the Collaboration or in Other Participants" in the *Competitor Collaboration Guidelines*, §3.34(c) ("The Agencies assess each participant's financial interest in the collaboration and its potential impact on the participant's incentive to compete independently with the collaboration. The potential impact may vary depending on the size and nature of the financial interest (e.g., whether the financial interest is debt or equity). In general, the greater the financial interest in the collaboration, the less likely is the participant to compete with the collaboration. The Agencies also assess direct equity investments between or among the participants. Such investments may reduce the incentives of the participants to compete with each other. In either case, the analysis is sensitive to the level of financial interest in the collaboration or in another participant relative to the level of the participant's investment in its independent business operations in the markets affected by the collaboration.").

[redacted][325]

4. Control of the collaboration's competitively significant decision making:[326] [redacted][327] [redacted]

5. The likelihood of anticompetitive information sharing:[328] [redacted]

[325] In a September 21, 2023, email James Pitaro, Chairman of ESPN, wrote that the JV is [redacted] TWDC_FUBO_00090946 at -947; *See also* WBD-00021826 at -826, a September 26, 2023 email from Luis Silberwasser, Chairman and CEO of WBD Sports, to executives at WBD [redacted] These documents are consistent with JV member financial models that show [redacted] *See, e.g.*, TWDC_FUBO_00123219, at-223; WBD-00023204, at -207; [redacted] TWDC_FUBO_00079295, at -301, -302.

[326] See the section entitled "Control of the Collaboration's Competitively Significant Decision Making" in the *Competitor Collaboration Guidelines*, §3.34(d) ("The Agencies consider the manner in which a collaboration is organized and governed in assessing the extent to which participants and their collaboration have the ability and incentive to compete independently. Thus, the Agencies consider the extent to which the collaboration's governance structure enables the collaboration to act as an independent decision maker. For example, the Agencies ask whether participants are allowed to appoint members of a board of directors for the collaboration, if incorporated, or otherwise to exercise significant control over the operations of the collaboration. In general, the collaboration is less likely to compete independently as participants gain greater control over the collaboration's price, output, and other competitively significant decisions. To the extent that the collaboration's decision making is subject to the participants' control, the Agencies consider whether that control could be exercised jointly. Joint control over the collaboration's price and output levels could create or increase market power and raise competitive concerns. Depending on the nature of the collaboration, competitive concern also may arise due to joint control over other competitively significant decisions, such as the level and scope of R&D efforts and investment. In contrast, to the extent that participants independently set the price and quantity of their share of a collaboration's output and independently control other competitively significant decisions, an agreement's likely anticompetitive harm is reduced.").

[327] TWDC_FUBO_0079295, at -305 [redacted] Pitaro Deposition, 161:13–21 [redacted] *See e.g.*,Campbell Deposition, 371:8–13 [redacted]

[328] See the section entitled "Likelihood of Anticompetitive Information Sharing" in the *Competitor Collaboration Guidelines*, §3.34(e) ("The Agencies evaluate the extent to which competitively sensitive information concerning markets affected by the collaboration likely would be disclosed. This likelihood depends on, among other things, the nature of the collaboration, its organization and governance, and safeguards implemented to prevent or minimize such disclosure. For example, participants might refrain from assigning marketing personnel to an R&D collaboration, or, in a

[redacted][329]

6. The duration of the collaboration:[330] [redacted][331]

(225) As explained above, analyses of these six factors as they relate to the JV mitigate competitive concerns. If, on the contrary, this analysis led to an expectation of anticompetitive harm, then the Guidelines recommend that any harm be weighed against "cognizable efficiencies" created by the JV.[332] As the Guidelines note, "[e]fficiencies generated through a competitor collaboration can enhance the ability and incentive of the collaboration and its participants to compete, which may

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marketing collaboration, participants might limit access to competitively sensitive information regarding their respective operations to only certain individuals or to an independent third party. Similarly, a buying collaboration might use an independent third party to handle negotiations in which its participants' input requirements or other competitively sensitive information could be revealed. In general, it is less likely that the collaboration will facilitate collusion on competitively sensitive variables if appropriate safeguards governing information sharing are in place.").

329 [redacted] FOX-065060, at -060. In a January 18, 2024 email to executives at Disney, Fox, and WBD, Jeff Cross, EVP Distribution & Commercial Partnerships, shared [redacted] TWDC_FUBO_00090891, at -891, -892 [redacted] *See e.g.*, Warbrooke Deposition, 97:16–98:13 [redacted] Warbrooke Deposition, 98:22–23 [redacted] D. Fox Deposition, 127:16–20 [redacted]

330 See the section entitled "Duration of the Collaboration" in the *Competitor Collaboration Guidelines*, 3.34(f) ("The Agencies consider the duration of the collaboration in assessing whether participants retain the ability and incentive to compete against each other and their collaboration. In general, the shorter the duration, the more likely participants are to compete against each other and their collaboration.").

331 TWDC_FUBO_0079295, at -295, -301 [redacted] The *Competitor Collaboration Guidelines* note that mergers are permanent, and that "the potential for future competition between participants in a collaboration requires antitrust scrutiny different from that required for mergers." *Competitor Collaboration Guidelines*, 5.

332 Cognizable efficiencies are procompetitive efficiencies associated with a collaboration agreement between competitors that "can enhance the ability and incentive of the collaboration and its participants to compete, which may result in lower prices, improved quality, enhanced service, or new products." These efficiencies must have been verified by Antitrust authorities, they must not arise from anticompetitive reductions in output or service, and they cannot be achievable through practical and significantly less restrictive means than the collaboration agreement between the competitors "… If the relevant agreement is reasonably necessary to achieve cognizable efficiencies, the Agencies assess the likelihood and magnitude of cognizable efficiencies and anticompetitive harms to determine the agreement's overall actual or likely effect on competition in the relevant market." *Competitor Collaboration Guidelines*, 23.

result in lower prices, improved quality, enhanced service, or new products."[333] I discuss the substantial efficiencies generated by the JV in Section V below.

IV.A.3. Mr. Orszag has no basis for opining that the JV will facilitate collusion

(226) Another way in which Mr. Orszag asserts that the creation of the JV will increase the JV members' market power is that it will facilitate collusion—meaning that even though the JV does not contemplate combining any of the JV members' licensing activities, its existence will cause the JV members to behave like a licensing cartel.[334]

(227) He first claims that the very formation of the JV represents a decision by the JV members to "collude" instead of compete. He writes:

> Quite simply: The JV members have decided to collude together to create a downstream product – instead of compete with each other – and that collusion, as implemented through Raptor, significantly increases the market power of the JV members in the market for the sale of sports programming to MVPDs and vMVPDs.[335]

(228) As with his false equivalency of the JV with a full merger of the JV members, Mr. Orszag has no basis for equating the creation of the JV to "collusion" between its members, as that word is normally understood in the antitrust context. The JV members decided to collaborate, not collude, and the *Competitor Collaboration Guidelines* draw a clear distinction between hard-core cartels, which are *per se* illegal and incur criminal liability, and competitor collaborations such as this one that are usually benign or procompetitive and are reviewed under the rule of reason for possible anticompetitive effects.[336] My understanding is that plaintiffs have not alleged that the creation of the JV is *per se* illegal.

(229) Elsewhere in his report, Mr. Orszag implies that the operation of the JV could facilitate collusion outside of the JV, either through a recognition of the JV members "mutual incentives to raise affiliate fees" or through information sharing within the JV:

> Further, to the extent that Raptor would allow the Defendants to better coordinate their pricing strategies—either through a recognition of their mutual incentives to raise affiliate fees or through increased information sharing about their negotiations

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333 *Competitor Collaboration Guidelines*, 23.

334 One can view this claim as asserting a different way that member's "interests" could become more aligned.

335 Updated Orszag Declaration, ¶ 74.

336 See sections entitled "Agreements Challenged as Per Se Illegal" and "Agreements Analyzed under the Rule of Reason" in the *Competitor Collaboration Guidelines*, §§ 3.2, 3.3.

with vMVPDs and MVPDs—such tacit or explicit coordination would further increase the bargaining leverage of the Defendants and hence provide additional upward pricing pressure.[337]

(230) Mr. Orszag has no basis for arguing that the operation of the JV will facilitate collusion outside of the JV. [redacted]

(231) As to Mr. Orszag's second point, that information sharing within the JV could increase its members' *ability* to collude, the JV is narrowly focused on the operation of a new sports video content distributor. [redacted][338]

(232) In sum, there is no reason to expect that the JV will lead to collusion among its members in the upstream market as Mr. Orszag defines it, and Mr. Orszag provides no evidence or analysis to the contrary.

IV.A.4. Mr. Orszag overstates the "market share" of the JV members

(233) Consistent with his analytical approach that treats the JV as a horizontal merger of the JV members, Mr. Orszag asserts that the creation of the JV will allow the JV members to control "more than 54 percent of the total U.S. sports rights."[339] He arrives at this number by summing the cost of the sports

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337 Updated Orszag Declaration, ¶ 116, n. 136. [redacted]

338 Venu's Firewall Policy for Third Party Competitively Sensitive Information outlines [redacted] FOX-065060, at -060; *See also* Warbrooke Deposition, 97:16–98:13 [redacted] Warbrooke Deposition, 98:22–23 [redacted]

339 The Citi Research report cited by Mr. Orszag includes sports rights paid to leagues by traditional programmers like Disney and Comcast as well as new direct buyers like Amazon and Apple which offer sports on their SVOD services.

media rights that the JV members currently broadcast, and dividing that by the total value of sports media rights in the United States.[340] [redacted][341]

(234) There are obvious problems with these calculations. First, as explained above, the JV does not combine its members' licensing activities and does not affect the economic interests of the members to compete in the upstream market, thus there is no joint "control" of any sports rights by the JV members and no justification for summing the "shares" of the JV members in this "market," as Mr. Orszag does, by appealing to the logic of a horizontal merger.

(235) Second, as I discussed in Section III.B, sports programming does not necessarily compete with other sports programming in the eyes of viewers. Different sports programming may in fact be *complements* in the eyes of MVPDs and vMVPDs as a package with a collection of sports programming may be a package worth more than the sum of its parts. (Indeed, an important element of the JV's value is that it offers all three JV members' sports networks. If the whole wasn't worth the sum of the parts, then, in a world where the JV members each had their own SVODs, no consumers would find subscribing to the JV to be better than subscribing to SVODs offered individually by the three JV members.) This lack of substitutability, and possible complementarity, means that even *joint* ownership of media rights to several sports would not necessarily lead to a significant increase in fees to MVPDs and vMVPDs.

(236) Third, in calculating his shares measured by sports rights value Mr. Orszag omits the sports rights that the leagues hold for themselves, which could potentially be licensed instead to MVPDs and vMVPDs. As such, he overstates the shares of each of the JV members.

(237) Finally, leaving even these critical issues aside, Mr. Orszag's market share measures focus only on shares at the time of the JV's creation, which overstate the shares going forward. This is especially relevant given that (as I discuss further in Section IV.B) [redacted] Thus, declaring that the summed share of sports telecast rights value at the present time is a meaningful measure of the combined leverage of the JV members fails to account for the trends in these shares over time, or the fact that the ownership of live sports ultimately rests with the leagues themselves, not the programmers.

(238) Figure 42 shows that the share of sports rights contracted for by the JV members has been declining in recent years. It presents the shares of the U.S. sports telecast rights contracted for by various

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The rights to televise sports that are retained by leagues (e.g., NBA showing basketball on NBA TV) are not included in this report. Updated Orszag Declaration, ¶ 19.

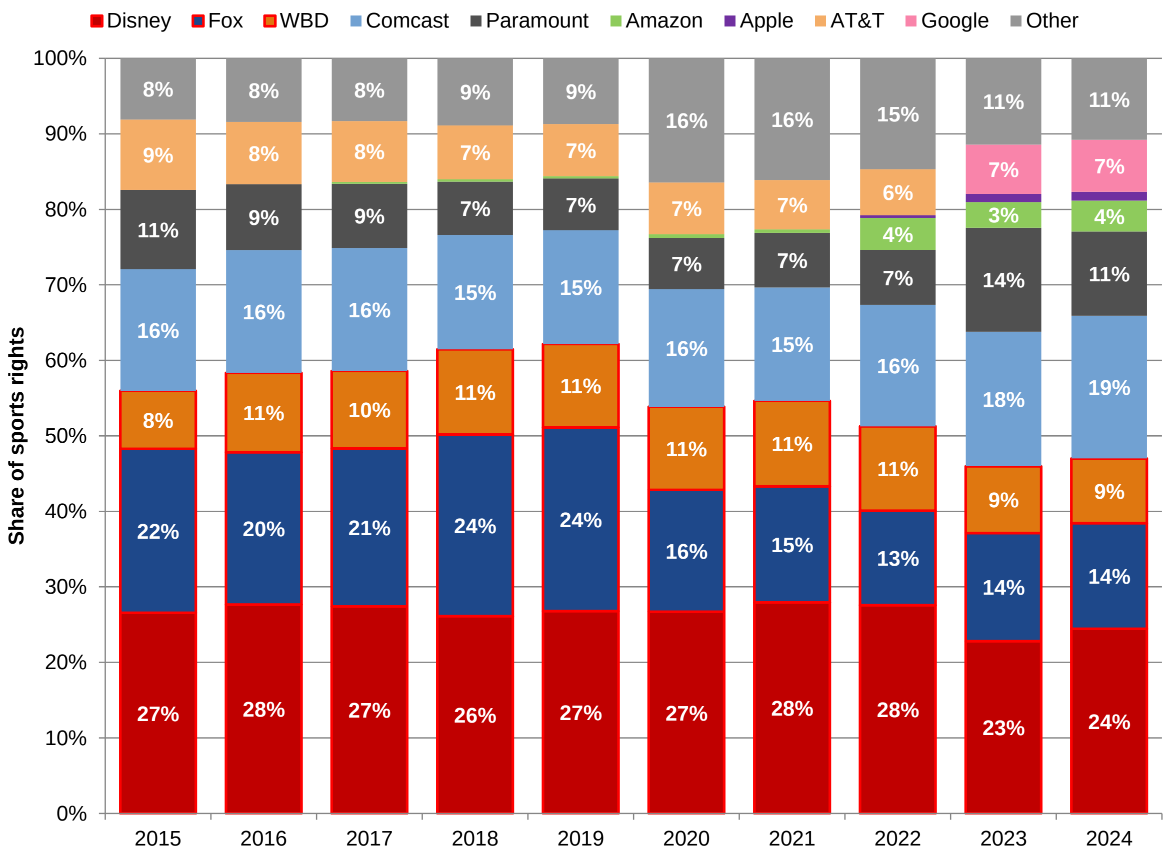
[340] Updated Orszag Declaration, ¶¶ 88–89.

[341] Updated Orszag Declaration, ¶ 81.

entities between 2015 and 2024 (and does not include rights held by the leagues), demonstrating that the share of sports telecast rights owned by the JV members has been decreasing over time, dropping from 62% in 2019 to under 50% in 2024. It also underscores the increasing importance of new direct buyers such as Google and Amazon. This is a trend that is highly likely to continue.[342]

[342] Amazon, Apple, Netflix, and Google are reportedly involved in ongoing NBA rights negotiations for the next decade of contracts that are expected to nearly triple the average annual value of the existing deals with Disney and Warner Bros. Discovery. The winners of these rights negotiations are yet to be announced. Alex Sherman, "NBA's Exclusive TV Rights Negotiating Window With ESPN, Warner Expected To Pass Without A Deal," *CNBC*, April 18, 2024, https://www.cnbc.com/2024/04/18/nba-tv-rights-news-on-negotiations-with-espn-warner-bros-discovery.html; Alex Sherman, "The NBA is Picking its Partners – and a Deal Hinges on Warner Bros. Discovery's Next Move," *CNBC*, May 16, 2024, https://www.cnbc.com/2024/05/16/nba-tv-rights-deal-hinges-on-warner-bros-discovery.html.

Figure 42. Shares of licensed-out sports telecast rights by licensee, 2015–2024



Source: Compiled from public sources, see my backup; "Fox Corporation (FOXA.O)," *Citi Research*, February 6, 2024, 2; John-Paul O'Sullivan and Scott Robson, "Global Sports Rights Update, H2 2023: Industry Awaits NBA and EPL Renewals," *S&P Global Market Intelligence*, November 24, 2023.
Note: JV members are outlined in red. Ownership of sports rights is attributed to the parent company of the relevant networks as of today. Other than AT&T's ownership of DirecTV's Sunday Ticket rights and the Turner Networks' rights between 2018 and 2022, no two parent companies' sports rights ownership overlaps. The denominator includes rights held by RSNs. RSNs owned by any of the named programmers are included in their totals. Shares of RSNs owned by sports teams are included in "Other." The set of sports included in the analysis is the union of the set of sports named in the Citi Research report cited by Mr. Orszag for his Figure 5 and the set of sports included in S&P Global's historical sports rights dataset. These reports were used to identify relevant sports rights contracts, but values for individual owners were compiled from public sources.

(239) Figure 43 shows another reason to expect this share to continue to decline: programmers do not own these rights, they just contract for them from the sports leagues for a limited time. Figure 43 shows the share of total licensed-out telecast rights that return to the leagues from 2025–2036 (again, not accounting for rights the leagues have retained), conservatively holding the value of each contract constant after it reverts to the leagues.[343] The share of the JV members rapidly decreases over time in this measure, reflecting the fact that media rights to live sports events now licensed by the JV

[343] If rights values continue to increase at historical rates, the shares returning to leagues are likely to approach 100% even more rapidly and the combined share of sports rights held by the JV members will decrease even faster than what I describe here.

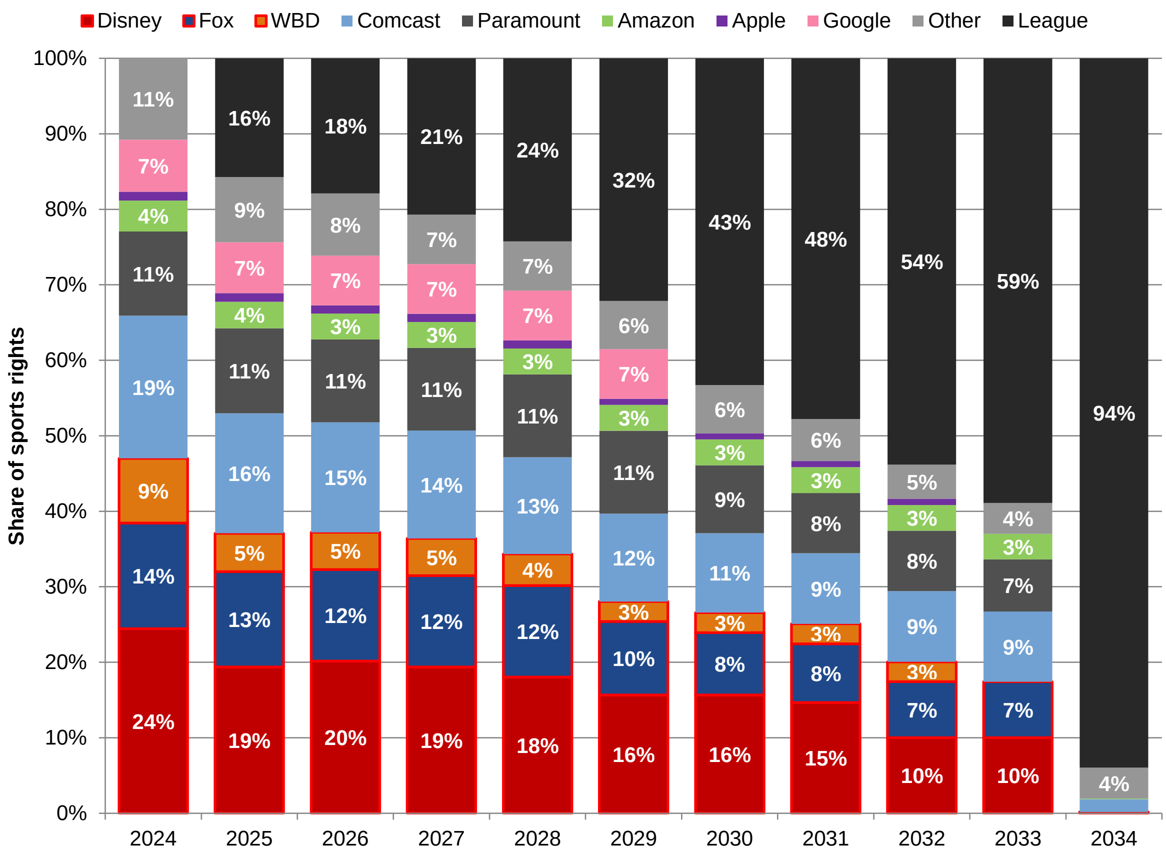
members may shift to and be used by other entities in the future, including the sports leagues themselves, which have the option of retaining their rights and telecasting their events directly to consumers.[344] The MLB, for example, has recently stated that it intends to retain the rights to in-market games that are currently held by RSNs, opting instead to televise these games on its DTC service MLB.TV.[345]

(240) As Figure 43 shows, by 2025 the combined share of the JV members will drop from 47% to 37%; By 2027 it will drop to 36%, and by 2029 it will drop to 29%.

344 And, as I noted earlier, these shares omit the fact that the leagues already retain significant sports rights, and so are overestimates of the JV members' shares even today.

345 Keyser, Hannah, "Forget the New Rules– the Biggest Story in Baseball Right Now is the Collapse of the Regional Sports Networks," *Yahoo Sports*, March 1, 2023, https://sports.yahoo.com/forget-the-new-rules--the-biggest-story-in-baseball-right-now-is-the-collapse-of-the-regional-sports-networks-032239854.html; *See also* Evan Drellich, "Could MLB Nationalize Its Media Rights? Why Some Clubs are Pushing to End Local TV Deals," *The New York Times*, May 17, 2024, https://www.nytimes.com/athletic/5500209/2024/05/17/mlb-national-streaming-deal-tv.

Figure 43. Shares of licensed-out sports telecast rights returning to leagues, 2024–2036



Source: Compiled from public sources, see my backup; "Fox Corporation (FOXA.O)," *Citi Research*, February 6, 2024, 2; John-Paul O'Sullivan and Scott Robson, "Global Sports Rights Update, H2 2023: Industry Awaits NBA and EPL Renewals," *S&P Global Market Intelligence*, November 24, 2023.
Notes: JV members are outlined in red. This figure is created by extending each sports telecast rights contract identified between leagues and programmers/new direct buyers through the end of the contract, holding the average annual value constant. When the contract expires, the value of the contract reverts to the league. Rights are aggregated by owner and year to produce shares.

(241) Moreover, Figure 43 likely overstates the current and projected sports rights share of the JV members for two reasons. First, as I noted above, it ignores the value of the rights that the leagues currently retain, such as the right of the NFL to show certain games on NFL+, or the MLB to show games through MLB.TV.[346] Executives from several major sports leagues have said that their leagues plan to

[346] NFL+, the NFL's specialized sports DTC service, offers simulcasts of local and primetime NFL games, postseason games, and eight exclusive games broadcast by NFL Network. This is seen in the NFL's agreements. "Explore NFL+," NFL, accessed May 20, 2024, https://www.nfl.com/plus/learn-more; MLB.TV, the MLB's specialized sports DTC service, offers simulcasts of out-of-market regular season MLB games (subject to national blackouts), pregame and postgame shows for 17 out of 30 clubs, and minor league games, as well as other baseball-related content. David Adler, "How MLB.TV Became the Gold Standard for Sports Streaming," MLB, May 24, 2023, https://www.mlb.com/news/mlb-tv-growth-as-top-sports-league-streaming-service; TWDC_FUBO_00077953, at -966; FOX-044398, at -414.

increase their own participation in direct-to-consumer distribution over time.[347] [redacted][348] For example, there has been speculation that the NFL will likely opt out of its current deals in 2030, and not in 2033 as the nominal contract length would indicate.[349]

IV.B. The evidence does not indicate that the JV will harm either competition or consumers through vertical foreclosure

(242) As I discussed in Section IV.A, Mr. Orszag's (*horizontal*) assertion that the creation of the JV will create market power by substantially reducing upstream competition among the JV members in Mr. Orszag's claimed market for the sale of sports network programming to vMVPDs and MVPDs has no merit.

(243) Mr. Orszag's other argument for anticompetitive harm from the JV in this claimed market is that the JV's creation gives each of its members an incentive to raise fees charged to downstream MVPDs and vMVPDs, and that some of that price increase will ultimately impact final consumers.[350] In short, it is

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[347] *See, e.g.*, NFL, "NFL+ Launches for the 2023 Season; Now Includes NFL Network, NFL RedZone," news release, August 10, 2023, https://www.nfl.com/news/nfl-launches-for-the-2023-season-now-includes-nfl-network-nfl-redzone ("'We launched NFL+ last season to further grow our direct relationship with millions of fans,' said NFL Commissioner Roger Goodell. 'The response was excellent. And as we embark on the second season of NFL+, we are excited to add NFL Network and NFL RedZone and provide greater access to football content for NFL fans everywhere.'"); NBA, "NBA Launches Reimagined App: the All-in-One Destination for NBA Fans of Every Team," news release, September 27, 2022, https://pr.nba.com/nba-launches-reimagined-app-the-all-in-one-destination-for-nba-fans-of-every-team/ ("'Launching our new NBA App and digital platform is a major milestone as we continue to build and strengthen our direct-to-consumer offerings,' said Chris Benyarko, NBA Executive Vice President, Direct-to-Consumer. 'We are thrilled to deliver a reimagined product that will enhance and personalize the way NBA fans engage with the league on a daily basis.'"); Bobby Nightengale, "MLB Commissioner Rob Manfred Wants Streaming For Teams Like the Twins," *Yahoo Finance*, February 8, 2024, https://finance.yahoo.com/news/mlb-commissioner-rob-manfred-wants-205900399.html ("Major League Baseball Commissioner Rob Manfred said Thursday, from the owner meetings in Florida, that MLB wants to implement a national streaming option in 2025 that would eliminate local blackouts. It would require, Manfred said, acquiring the TV rights for at least 14 teams, which would surely include the Twins. The league has its own streaming service, MLB.TV, but live games are not available to fans who live in their team's local market. 'Realistically, my target to having a digital package I can take to market would be for the '25 season,' Manfred told reporters.").

[348] In ESPN's Monday Night Football Coverage contract, the NFL [redacted] In Fox's Sunday NFC Package contract, the NFL [redacted] Both the MLB and ESPN have [redacted] TWDC_FUBO_00077953, at -959; FOX-044398, at -403; TWDC_FUBO-00078035, at -055.

[349] Mike Florio, "Get Ready for All NFL Broadcast Deals to be Scrapped as of 2029," *Pro Football Talk*, May 11, 2024, https://www.nbcsports.com/nfl/profootballtalk/rumor-mill/news/get-ready-for-all-nfl-broadcast-deals-to-be-scrapped-as-of-2029 ("Recent developments make it obvious that the NFL will indeed exercise its right to take every broadcast package back to market, with the next wave of deals kicking in as of 2030.").

[350] *See* Updated Orszag Declaration, ¶¶ 82–92.

a claim that the introduction of the new downstream JV product—a product that creates a situation of vertical integration for the JV members—gives each JV member an incentive to raise fees (albeit, individually) to third-party MVPDs and vMVPDs such as Fubo. As I noted above, this is a *vertical* claim that the JV creates incentives for what is commonly referred to as “raising rivals’ costs” or “vertical foreclosure.”[351]

(244) Mr. Orszag’s discussion of this vertical theory of harm is severely flawed, however, and completely ignores essential steps in such an analysis as well as the substantial benefits the JV brings to the marketplace.

(245) I begin my discussion in Section IV.B.1 by noting that, contrary to Mr. Orszag’s claims, the creation of the JV by the JV members is likely to lead to meaningful procompetitive effects, a point that I return to in Section V.

(246) In Section IV.B.2, I describe Mr. Orszag’s vertical foreclosure claims, which are entirely speculative and backed up by no examination or analysis of any evidence on issues that are required for such a claim.

(247) In Section IV.B.3, I point out a critical flaw in Mr. Orszag’s claims, especially for purposes of this PI hearing: the JV members’ existing distribution contracts with MVPDs and vMVPDs – including Fubo – significantly curtail each of their abilities to raise prices for their sports network prices to these distributors.

(248) In Section IV.B.4, I describe the numerous issues that Mr. Orszag fails to analyze and explain how they are essential elements for establishing a claim of vertical foreclosure.

[351] *See, e.g.* Steven C. Salop and David T. Scheffman, “Raising Rivals’ Costs,” *American Economic Review* 73, no. 2 (May 1983): 267 (“[A] firm can induce its rivals to exit the industry by raising their costs. Some nonprice predatory conduct can best be understood as action that raises competitors’ costs. To a predator, raising rivals’ costs has obvious advantages over predatory pricing. It is better to compete against high-cost firms than low-cost ones. Thus, raising rivals’ cost can be profitable even if the rival does not exit from the market.”); See for example, Carl M. Shapiro, “Vertical Mergers and Input Foreclosure Lessons from the *AT&T/Time Warner* Case,” *Review of Industrial Organization* 59 (2021): 305 (“This article explains how to analyze whether a vertical merger will cause the vertically integrated firm to raise the price that it charges downstream rivals for an acquired input. In the language of the 2020 Guidelines, this involves ‘raising rivals’ costs’ (RRC). For clarity, I reserve the term ‘total foreclosure’ for a flat refusal to sell the input to downstream rivals, not merely raising the price of the input. I use the term ‘foreclosure’ to encompass both RRC and total foreclosure.”); William P. Rogerson, “Modelling and Predicting the Competitive Effects of Vertical Mergers: the Bargaining Leverage Over Rivals Effect,” *Canadian Journal of Economics* 53, no. 2 (May 2020): 408 (“The basic idea of the RRC theory is that a vertical merger between an upstream firm and a downstream firm increases the merged firm’s incentive to raise input prices to downstream rivals because it recognizes that increasing the input price it charges to downstream rivals will raise these rivals’ costs in the downstream game. This, in turn, will cause downstream prices to rise, thereby increasing the profit of its own downstream affiliate.”).

IV.B.1. Vertical integration is associated with many procompetitive benefits, especially when it arises because of creation of a new product

(249) The creation of the JV in this matter both introduces a new differentiated product to the marketplace and creates a situation of vertical integration of upstream programming with downstream distribution. Both of these changes can provide important benefits to consumers.

(250) The economic analysis of vertical integration recognizes that it generally has the potential for benefits and harms. On the benefits side, it can lead to consumer benefits through lower prices (the elimination of "double marginalization"), more efficient carriage decisions, greater investment, and better coordination between upstream and downstream affiliates, all of which can increase output and benefit consumers.[352]

(251) In the present matter, the benefits for consumers are even greater than in the textbook case of vertical integration between *existing* upstream and downstream firms (i.e., the case of a vertical *merger*), because the JV creates a *new downstream differentiated product* with unique features, itself a consumer benefit with the potential to increase overall consumption of the JV members' respective programming, and can increase downstream competition among distributors leading to lower prices for consumers.[353] Indeed, Mr. Orszag makes a point of saying that a problem with the JV for Fubo is

[352] *2023 Merger Guidelines*, 16 ("A common rebuttal argument is that the merger would lead to vertical integration of complementary products and as a result, 'eliminate double marginalization,' since in specific circumstances such a merger can confer on the merged firm an incentive to decrease prices to purchasers."); David Besanko et al., *Economics of Strategy*, 7th ed. (Hoboken, NJ: John Wiley & Sons, 2016), 136 ("Double marginalization results when an upstream supplier exploits its power by marking up prices above marginal costs, and the downstream buyer exploits its own power by applying yet another markup to these already marked-up supply prices. This 'double markup' causes the price of the finished good to exceed the price that maximizes the joint profits of the supplier and buyer."); On how the inherent limitations of contractual relationships can yield inefficiently low production and investment levels. *See, e.g.*, David Besanko et al., *Economics of Strategy*, John Wiley & Sons, 7th edition (2016), 116–117 ("Oliver Hart emphasizes the breakdown of cooperation that can arise between parties in the [arm's length] relationship. The resulting distrust raises the costs of contracting in two ways. First, it increases the direct costs of contract negotiation as parties insist that more formal safeguards be written into the contract. Second, distrust impedes sharing information or ideas to achieve production efficiencies or quality improvements."); David Besanko et al., *Economics of strategy*, John Wiley & Sons, 7th edition (2016), 119 ("Use of market firms may lead to the holdup problem in which one trading partner exploits contractual incompleteness to renegotiate the terms of a contract. Fearful of losing money on relationship-specific investments, the other trading partner anticipates holdup and refuses to make these valuable investments."); Dennis W. Carlton and Jeffrey M. Perloff, *Modern Industrial Organization*, 4th ed. (Boston: Pearson/Addison Wesley, 2005), 419 ("Suppose that one distributor heavily advertises a manufacturer's product that is also carried by another distributor. The first distributor creates a demand for the product, which benefits both distributors, but the second distributor incurs no cost at all. Unless something is done, the first distributor may have little incentive to advertise, because it does not capture the full benefits of its advertising."); For more discussion, see Section VI.B.

[353] *See* Section V.

that the JV's planned price is low.[354] Mr. Trautman also indicates that the JV would "undercut MVPD and vMVPD competitors on price."[355]

(252) On the harm side, whenever an upstream firm decides to enter a downstream market, its incentive to supply independent downstream firms may change, and could potentially lead to price increases or decreases to certain distributors. This is not a result of the JV *per se* but is a possible consequence of any upstream supplier entering a downstream market. A similar change in incentives could have occurred, for example, when NBC entered the downstream distribution market via the creation of Peacock, or when CBS did so via the creation of Paramount Plus.

(253) Whether this change in incentives will push prices up and, if so, whether this potential price increase would outweigh the benefits of vertical integration is a highly context and fact-specific question. The economics literature suggests that in most cases it is unlikely to do so, but that in some cases it may.[356]

(254) For example, in a 2018 paper published in *Econometrica*, I studied (with co-authors) the impact of vertical integration between regional sports networks (RSNs) and MVPDs (usually traditional cable operators) using data from 2000 through 2010. There we evaluated the extent to which vertical integration eliminated double marginalization and led to more efficient carriage of the RSN against the potential for this vertical integration to lead to higher affiliate fees charged to rival MVPDs (typically the two satellite firms). We found that the overall effect of vertical integration was positive for consumers even though the downstream cable companies that were integrating with RSNs had a dominant share of (local) distribution.[357]

(255) Notably, in this matter, the JV will have a small share of a dynamic national video distribution market as opposed to cable companies' dominant share of the local distribution market during the 2000-2010 period.[358] In addition, unlike in that analysis, in this matter, the formation of the JV creates a new

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[354] Updated Orszag Declaration, ¶ 101 ("[w]hile the proposed JV would offer 14 sports-focused channels as well as ESPN+ for an estimated $40-50 per month, for the 14 package/MVPD combinations presented in Table 3, customers would pay an average of $63 per month – or 26 percent more – to receive only seven of the JV stations, but 106 total channels, many of which customers may not desire.").

[355] Updated Trautman Declaration, ¶ 46 ("The JV will use its competitive advantage in the marketplace (e.g., the exclusive rights to sell a "skinny" sports bundle) to undercut MVPD and vMVPD competitors on price.").

[356] *See* James C. Cooper et al., "Vertical Antitrust Policy as a Problem of Inference," *International Journal of Industrial Organization* 23, no. 7–8 (September 2005): 658 ("Most studies find evidence that vertical restraints/vertical integration are procompetitive; [t]his efficiency often is plausibly attributable to the elimination of double-markups or other cost savings; […] [i]nstances where vertical controls were unambiguously anticompetitive are difficult to find.").

[357] Gregory S. Crawford, Robin S. Lee, Michael D. Whinston, and Ali Yurukoglu, "The Welfare Effects of Vertical Integration in Multichannel Television Markets," *Econometrica* 86, no. 3 (May 2018): 894 ("[T]he overall effect of vertical integration in the absence of effective program access rules—allowing for both efficiency and foreclosure incentives—is to increase consumer and total welfare on average, resulting in (statistically significant) gains of approximately $0.38-$0.39 per household per month, representing 15-16% of the average consumer willingness to pay for an RSN.").

[358] The likelihood of harmful foreclosure was directly related to the vertically integrated cable company's share of a local

downstream, differentiated product. Thus, overall, in this matter the prospect for procompetitive benefits is substantially higher and the prospect for vertical foreclosure is much lower than in the case of the integration of existing RSNs and incumbent cable companies that I analyzed in my 2018 paper. Yet even in that environment, I found that vertical integration led to consumer benefits. The same result is even more likely here.

IV.B.2. Mr. Orszag's claims about the risks of increased sports network programming fees to MVPDs and vMVPDs are entirely speculative

(256) Mr. Orszag asserts that the vertical integration of the JV members brought about by the JV will increase the unilateral incentives of its members to raise the prices for sports network programming paid by MVPDs and vMVPDs, and lead to "direct antitrust injury to firms like Fubo that are participants and direct purchasers in that market."[359] He describes the potential change in incentives deriving from the JV members participating in the downstream market as follows:

> First, because the Defendants will now have a JV that competes with vMVPDs and MVPDs, if the higher affiliate fees charged by the Defendants resulted in lost vMVPD/MVPD subscribership, some of those lost subscribers would be "recaptured" by Raptor. That is, if a subscriber—in particular, a subscriber that watches sports programming—cancels his or her Fubo subscription because the monthly fee is too high, he or she may sign up for the lower priced "skinny bundle" of sports programming offered by Raptor. Thus, some of the revenue and profits that a JV member would forgo by raising prices to Fubo (or other vMVPDs/MVPDs) would be recouped by the profits earned by increased subscribership for the JV.[360]

(257) Mr. Orszag's passage describes the standard conceptual framework for potential harm arising from vertical integration, often referred to as "vertical foreclosure" or "raising rivals' costs."[361] Notably however, nowhere in this passage, or anywhere else in his Declarations, does Mr. Orszag present any analysis whatsoever of the extent to which such an effect would (or even could) actually be present to

market, with harm more likely in local markets in which that share was large. (This effect arose because when the cable firm had a large share of the local subscribers it gained more from denying access to or raising the affiliate fees of its RSN to the satellite firms.) In my 2018 *Econometrica* paper, during the 2000-2010 time period we studied, the vast majority of US households had three MVPDs they could subscribe to: a local cable company (Comcast, Time Warner, or Cablevision) or two nationwide satellite companies (DirecTV or Dish Network). By comparison in this matter, as I explain in Section II.A.4, traditional local MVPDs are still available but consumers have many additional options available nationwide through the different vMVPDs, DTC services, and SVODs that have launched since 2010. In addition, the industry is much more fluid with content creators and programmers self-distributing content on DTC services, vMVPDs, and SVODs.

[359] Updated Orszag Declaration, ¶ 114; The "price" charged to a MVPD or vMVPD by a programmer can include not only the affiliate fee but also other terms affecting the profits the programmer and distributor such as the split of advertising revenue.

[360] Updated Orszag Declaration, ¶ 112.

[361] See footnote 351.

any significant degree because of the JV.[362] As I now explain, and return to discuss further in Section IV.B.4, whether there is likely to be a significant ability and incentive to increase prices to third-party MVPDs and vMVPDs depends on numerous factors that Mr. Orszag fails to analyze.

(258) To substantiate the kind of effects that Mr. Orszag posits, he would need to show the actual abilities and incentives of JV members to raise their prices to independent MVPDs and vMVPDs that arises because of the creation of the JV. To do so requires examination and analysis of numerous factors:[363]

- To what extent do the JV members' existing contractual agreements with MVPDs and vMVPDs curtail their abilities to raise prices?
- How would an MVPD or vMVPD react to an increase in the affiliate fee a JV member charges for its sports network programming? Would it stop licensing those networks? Limit inclusion of those networks to a smaller number of its packages? Continue carrying the networks? And if it does continue carrying the networks, would it raise its package prices or keep them unchanged? If it does raise package prices, by how much would it do so? And, importantly, how would the existence of the JV *change* the MVPD or vMVPD's reaction?
- Given how the MVPD or vMVPD would react, how will consumers respond – to what extent would they stop subscribing to the MVPD or vMVPD and what would those consumers who do stop subscribing do? Would they switch to another pay TV distributor or switch to an alternative (non-pay TV) service? And, again, how would this change after creation of the JV and, importantly, to what extent would they switch to the JV?
- What are each of the JV members' profits when a consumer subscribes to each of the various distributors, including the JV after its creation?
- What does all of the above imply for the profitability of a price increase by a JV member before versus after creation of the JV?
- How does the bargaining power of each of the JV members relative to each distinct distributor – some of which are very large and some of which are very small – affect the ability of a JV member to achieve a desired price increase?
- How does the fact that existing contractual obligations may expire in a staggered fashion (i.e., at different times with different distributors) affect the above issues and the ability of a JV member to achieve a price increase across all MVPDs and vMVPDs?

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362 Particularly telling in this regard are the presumptions in Mr. Orszag's statement: a subscriber may be shifted to the JV's package "*if* the subscriber cancels his or her Fubo subscription" and he or she "*may* sign up for the lower priced 'skinny bundle' of sports programming offered by the JV" (emphasis added).

363 See, for example, the discussions in Carl M. Shapiro, "Vertical Mergers and Input Foreclosure Lessons from the AT&T/Time Warner Case," *Review of Industrial Organization* 59 (2021): 303-341; William P. Rogerson, "Modelling and Predicting the Competitive Effects of Vertical Mergers: the Bargaining Leverage Over Rivals Effect," *Canadian Journal of Economics* 53, no. 2 (May 2020): 407-436.

(259) Mr. Orszag utterly fails to consider those necessary questions. Specifically, Mr. Orszag:

1. Assumes, without any analysis, that the JV members are able to immediately raise prices of their sports network programming, without considering limitations on this ability.[364] In reality, existing contractual commitments significantly curtail the ability of the JV members to raise prices.

2. Assumes, without any analysis, that the impact on pricing incentives to downstream firms resulting from the creation of the JV will be large and positive.[365] In doing so, he fails to provide even a cursory analysis of the many factors that affect these incentives. For example, he:

   A. fails to examine the likelihood that consumers would shift or cancel their (v)MVPD subscriptions;

   B. fails to estimate the extent to which any such consumers would shift to the JV as opposed to any of the many other sources for video content;

   C. fails to calculate the relative profitability of sales to different downstream distributors for the JV member.

Each of these (as well as the other factors described in the previous paragraph) is an essential step in any analysis of the risk of vertical foreclosure.

(260) In addition, a proper economic analysis would also need to compare any such effects to any efficiencies from vertical integration that lead to lower downstream prices and other consumer benefits.[366] Instead, Mr. Orszag ignores efficiencies resulting from the JV that benefit consumers. As I explain in Section V, his explanation for doing so is brief and unconvincing.[367] This is especially so given that Mr. Orszag and Mr. Trautman both acknowledge that the JV creates a new downstream distributor with unique content and low prices; yet Mr. Orszag does not give these facts any weight in his analysis.[368]

(261) I discuss each of these points in more detail below. In Section IV.B.3, I discuss the limitations on the JV members' short-term abilities to raise prices to distributors. In Section IV.B.4, I discuss the factors

364 Updated Orszag Declaration, ¶ 112 ("Following the launch of the JV, both effects would be weakened.").

365 Updated Orszag Declaration, ¶¶ 114–115.

366 Mr. Orszag refers to effects on the "prices" or "affiliate fees" charged for sports network programming. More broadly, effects could also impact the split of advertising revenues between a JV member and a third-party distributor. When I use the terms "prices," "affiliate fees," or "fees" I intend this broader meaning.

367 Updated Orszag Declaration, ¶¶ 120–123.

368 *See, e.g.*, Updated Orszag Declaration, ¶ 6 [redacted] Updated Trautman Declaration, ¶¶ 48–49 [redacted]

that Mr. Orszag fails to consider but that critically impact a JV member's incentive to raise fees to distributors.

(262) I discuss procompetitive benefits from the JV, which Mr. Orszag ignores in his analysis, in Section V below.

IV.B.3. Mr. Orszag ignores the limitations on the JV members' ability to raise prices to third-party MVPDs and vMVPDs

(263) Mr. Orszag claims that the proposed JV "will give each party to the JV the incentive and ability to substantially increase prices" of sports network programming to MVPDs and vMVPDs.[369] However, he ignores an important fact: that existing contractual obligations significantly curtail the JV members' abilities to raise sports network programming prices to MVPDs and vMVPDs. For example, [redacted] [redacted][370]

(264) Figure 44 and Figure 45 present the share of contract value by distributor over time for Disney and Fox, respectively. Both figures show that [redacted]

[369] Updated Orszag Declaration, ¶ 108.

[370] TWDC_FUBO_00082294, at -306; FOX-022688, at -691; Fubo does not currently license from WBD.

[redacted]

[redacted]

IV.B.4. Mr. Orszag's conclusion that the JV members have incentives to raise sports network programming prices to third-party MVPDs and vMVPDs lacks support

(265) The limited *ability* of JV members to raise prices to distributors substantially undercuts Mr. Orszag's claims of harm from the transaction (and any need for a preliminary injunction, as I discuss in Section VI). But putting that issue aside, Mr. Orszag's claims about JV members' supposed incentives to raise prices to MVPDs and vMVPDs of their sports networks are purely speculative. He fails to provide any actual analysis showing *whether* the JV even creates an *incentive* for a JV member to raise its sports network programing prices to third-party MVPDs and vMVPDs and, if so, what the extent of any such supposed price increase might be.

(266) Mr. Orszag claims that the JV will give its members a unilateral incentive to increase prices to third-party MVPDs and vMVPDs.[371] He argues that this incentive comes about because any price increases to third-party MVPDs and vMVPDs will be at least partially passed through to subscribers, and after the creation of the JV some portion of subscribers leaving third-party distributors due to increased prices would migrate to the JV instead of leaving the pay TV ecosystem altogether.[372] He then claims, without any analysis, that this implies that each JV member will have an incentive to substantially raise its prices to these MVPDs and vMVPDs (who will then pass on some or all of that increase to consumers).[373]

(267) This claim by Mr. Orszag simply identifies a possible change in pricing incentives that results in this industry any time an upstream firm – whether programmer or sports league – enters downstream distribution. For instance, this basic logic holds when WBD began to distribute sports via Max, or NBC via Peacock, or CBS via Paramount Plus, or ESPN via ESPN+. Such entry is likely to be procompetitive, leading to consumer benefits including increased consumer choice, despite any accompanying change in pricing incentives to independent distributors. The important question is not whether such a change in incentives *possibly* exists when an upstream firm moves downstream, it is whether it *actually* exists and whether, when considering both the size and likelihood of any such change in incentive and potential countervailing efficiencies, the creation of a downstream product will likely lead to substantial consumer harm.

(268) However, in the face of clear, meaningful consumer benefits from the JV, Mr. Orszag conducts *no analysis whatsoever* that shows that the creation of the JV will change pricing incentives *at all*, let alone that it would change them to such a degree that the new pricing would outweigh the considerable benefits from the JV.

(269) Typically, vertical foreclosure models are driven in large part by the incentive of the integrated firm to move downstream customers from unaffiliated downstream firms to its own downstream affiliate. The logic is straightforward: sales made through its own downstream affiliate are more profitable, in part because the integrated firm does not have to share profits with an unaffiliated downstream firm. In this matter, however, the JV members lack a comparable incentive. When downstream customers move from an MVPD or vMVPD to the JV, [redacted]

371 Updated Orszag Declaration, ¶ 106 ("Raptor itself will change Defendants' incentives in a way that will likely result in increased incentives for the Defendants to increase affiliate fees to Fubo and other vMVPDs and MVPDs…"); I discuss his analysis of joint incentives in Section IV.A above.

372 Updated Orszag Declaration, ¶ 112 ("Because the Defendants will now have a JV that competes with vMVPDs and MVPDs, if the higher affiliate fees charged by the Defendants resulted in lost vMVPD/MVPD subscribership, some of those lost subscribers would be 'recaptured' by Raptor.").

373 Updated Orszag Declaration, ¶ 108 ("Raptor will increase the market power of the JV members in the sale of sports programming to MVPDs and vMVPDs, and will give each party to the JV the incentive and ability to substantially increase prices in that relevant market.").

[redacted] Thus, [redacted].[374] Thus a key driver of typical vertical foreclosure models is not present in this matter. Mr. Orszag has not even recognized this issue, let alone measured the extent of any resulting foreclosure incentives that might (or might not) exist given this fact.

(270) More generally, Mr. Orszag fails to address the many essential factors that I described in Section IV.B.2 and that are critical to any reliable economic analysis of vertical foreclosure.

(271) To make the factors I listed in Section IV.B.2 and Mr. Orszag's lack of analysis more concrete, suppose that Fox were to try to raise the price of one or more of its sports networks to an unaffiliated MVPD or vMVPD. To establish his claimed incentive for Fox to raise its sports network programming prices due to creation of the JV, Mr. Orszag would have needed to compare what happens *today in the absence of the JV* with what would happen *after the creation of the JV*.

(272) *Today in the absence of the JV*, that distributor will need to decide how to respond to the price increase. One possibility is that it continues to carry those Fox sports networks in all the packages that previously contained them. In that case, it may pass through some of the cost increase into the package prices it charges consumers, which may lead some consumers to end their subscriptions to the distributor's service. Another possibility is that the distributor stops carrying some or all the Fox sports networks in some or all of its packages, perhaps substituting an alternative network into its channel lineups. The ability of the distributor to cease carrying Fox's sports networks will limit any price increase and may even result in a decrease in its package prices to consumers, limiting or even preventing any loss in the distributor's number of subscribers.

(273) Then, even if the distributor's response *does* lead a substantial number of consumers to end their subscriptions, those former subscribers have at least three options: (1) switch to another distributor licensing Fox's content; (2) switch to a distributor not licensing Fox's content; or (3) not replace the

374 [redacted] See, for example, FOX-057328, at -340 [redacted] *See also* Espinosa Deposition, 155:18–23 [redacted] Iger Deposition, 80:1–12 [redacted] D. Fox Deposition, 160:17–161:13 [redacted] Deposition of Paul Cheesbrough, June 28, 2024 [hereinafter "Cheesbrough Deposition"], 76:11–20 [redacted]

cancelled subscription with any other Pay TV service. Fox earns various fees from the first option but does not earn any revenue from the last two options.[375]

(274) In considering whether it benefits from a higher sports network programming affiliate fee charged to the distributor, Fox will weigh the possibility of greater revenue from each existing subscriber against the potential for reductions in affiliate fee (and likely advertising revenue) because of a drop in subscriptions at the distributor level and also must factor in the extent to which subscribers shift to other distributors from which Fox earns affiliate fees (and advertising revenue) or cease subscribing to any pay TV service.

(275) *After the launch of the JV*, each of these factors may change because subscribers leaving an unaffiliated distributor have a fourth option: switching to the JV. Because of this additional option, the distributor's reaction to the fee increase, the likelihood of subscribers leaving the distributor, and what any departing subscribers would shift to is likely to change. Mr. Orszag effectively *assumes* that the changes caused by the introduction of the JV gives Fox an incentive to substantially raise prices to unaffiliated distributors relative to its incentive prior to the creation of the JV. But this conclusion is not at all clear, despite his claims to the contrary. And Mr. Orszag provides no analysis at all of these factors to show that his conclusion follows.[376]

(276) Put it simply, analysis of vertical foreclosure issues is a highly fact-based exercise that aims to identify whether there is a serious likelihood that rivals would face increased costs; Mr. Orszag utterly fails to provide any such analysis.

(277) Finally, leaving aside all the above weaknesses in Mr. Orszag's discussion of vertical foreclosure, Mr. Orszag also focuses on the wrong comparison ("but-for world") because he conflates the impact of the creation of the JV with the impact of only the fact that the JV members *own* the JV. That is, he lumps in effects that would arise from *any* instance in which they would supply a *third-party* distributor. The correct comparison would ask instead whether there is significant harm from the creation of the JV compared to if the JV members had instead individually licensed a third-party

[375] If we were considering a price increase by Disney instead of Fox there would be a fourth possibility: switching to Disney-owned Hulu.

[376] A commonly employed approach to analyzing the risks of vertical foreclosure instead models affiliate fees as set through a bilateral bargaining process between a programmer and a distributor. *See* Carl M. Shapiro, "Vertical Mergers and Input Foreclosure Lessons from the AT&T/Time Warner Case," *Review of Industrial Organization* 59 (2021): 303–341; The affiliate fee that emerges from this bargaining is a weighted average of the loss in profit the distributor would suffer (on a per-subscriber basis) from losing access to the JV member's networks and any gain in profit (again, on a per-subscriber basis) that the JV member would achieve by denying the distributor access to the JV member's sports networks (this gain can—but need not—arise if subscribers would shift to other distributors from which the JV members earns affiliate fees (or advertising revenue)). The weights depend on the two parties' relative bargaining strengths, with the weight on the distributor's loss being greater when the JV member is the party with greater bargaining strength. Intuitively, if the JV member has much greater bargaining strength than the distributor then it will be able to strike a deal that leaves the distributor with no gains from trade—the per-subscriber affiliate fee will then be close to the loss the distributor would face if a deal doesn't happen. As with the approach that Mr. Orszag takes, the JV's introduction may lead to little or no increase in affiliate fees and may even reduce them.

distributor such as Fubo or YouTubeTV and allowed it to offer the same skinny sports bundle that the JV intends to offer, a situation that Mr. Orszag clearly thinks would be procompetitive.[377]

(278) As I discussed in Section II, my understanding is that [redacted] (I also discuss the evidence on this point in Section V.) To the extent that this means that [redacted] there would be *no anticompetitive effect* from the JV members' ownership of the JV on each of their incentives for pricing their sports network programming to MVPDs and vMVPDs because [redacted][378] [redacted]

[377] Updated Orszag Declaration, ¶ 105 ("Consumers would benefit if the Defendants allowed Fubo and others to license and market other packages of sports, news, and entertainment content than the 'big fat bundle' that the Defendants' carriage agreements currently require.").

[378] I also note here two other points in Mr. Orszag's report relating to incentives to charge high affiliate fees that make no sense. In ¶ 117 of his Updated Declaration Mr. Orszag makes multiple speculative and nonsensical assertions: he asserts that the "presence of 'most favored nations' clauses in their carriage agreements with distributors may provide the Defendants further incentives to increase the affiliate fees they charge Raptor" and goes on to suggest that this would somehow lead to higher fees to other unaffiliated distributors ("By charging Raptor a high affiliate fee and granting it a most favored nation clause, Defendants can obtain leverage with which to force other distributors to pay the higher affiliate fee"). Yet, Mr. Orszag never explains [redacted] Updated Orszag Declaration, ¶ 117; Then, in the next paragraph (¶ 118), Mr. Orszag erroneously cites several articles for the claim that "economic models of bargaining suggest that the introduction of a differentiated product by vertically integration -- such as the skinny sports-focused bundle that Raptor seeks to introduce--can lead to higher wholesale prices if the integrated supplier can impose vertical restrictions on unaffiliated distributors that prohibit them from offering a competing product." Mr. Orszag's citations do not support his claims. First, none of the three cited papers discuss the introduction of a new product. Second, the assumptions in the cited papers do not apply to this case. : (i) they consider settings in which vertical integration cannot lead to procompetitive effects such as elimination of double marginalization and (ii) the contractual restrictions they consider are not restrictions on downstream distributors but rather are exclusivity provisions on an *upstream* supplier. Updated Orszag Declaration, ¶ 118.

V. The JV will create substantial procompetitive benefits for consumers

(279) As I discussed in Section IV.B, the economic literature indicates that it is often beneficial for consumers when an upstream firm enters downstream distribution. Considering and giving appropriate weight to potential procompetitive benefits of vertical integration is thus an important part of any analysis of the competitive effects of a transaction such as this one, especially one that creates a new, differentiated downstream product. Mr. Orszag dismisses potential efficiencies resulting from the JV and thus fails to provide a complete assessment of its competitive effects.

(280) In this section, I describe the procompetitive benefits arising from the creation of the JV. In Section V.A, I discuss the fact that the JV introduces a new, differentiated product to consumers. New products such as the one created by the JV are particularly likely to generate direct benefits to consumers, in this case by offering a collection of video content heretofore unavailable to consumers at a single distributor and at a lower price point. In addition, the proposed JV is likely to provide additional benefits to consumers by putting downward pricing pressure on the prices consumers pay for currently existing packages of video content.

(281) In Section V.B, I explain how joint ventures—especially those such as this one that involve vertical integration—frequently create value for consumers by combining complementary capabilities and internalizing certain externalities.

(282) Finally, in Section V.C, I discuss Mr. Orszag's arguments that there are no procompetitive benefits to the JV worth considering and that the JV harms competition among pay TV distributors.

V.A. The JV's new differentiated product will benefit consumers

(283) The JV will create a new product differentiated from others currently on the market and the JV members have stated that they intend to increase overall consumption of their respective sports-related programming.[379] Most notably, the JV will feature only the three JV members' linear networks

[379] Cheesbrough Deposition, 77:3–17 [redacted] Pitaro Deposition, 215:3–7 [redacted] *see also* Iger Deposition, 91:14–18 [redacted] Espinosa Deposition, 153:20–154:11 [redacted]

and digital services that include sports content.[380] Highlighting the fact that the JV will bring a differentiated product to market, the JV members' contemporaneous business documents state that they intend to target potential customers currently not part of the pay TV ecosystem.[381] The JV members' public statements are consistent with their contemporaneous business documents.[382]

(284) The economics literature shows that the introduction of a new and differentiated product can benefit consumers.[383] The proposed JV falls into that category. One article succinctly explains the channels through which the introduction of new goods benefits consumers and competition: "[i]n the general case, consumers are affected by new product introductions in two ways. First, they gain the surplus

[380] As I discussed in Section II.B.1, Venu Sports will include all of the JV members' linear networks with sports content with the exception of ESPN Deportes and Fox Deportes.

[381] FOX-057328, at -331, -340, -348. *See also* WBD-00023279, at -285; Iger Deposition, Exhibit 3, 22 [redacted]

[382] FOX-057328, at -331, -341, -348 [redacted] WBD-00023279, at -285 [redacted] "Fox Corporation FQ2 2024 Earnings Call," *S&P Global Market Intelligence*, February 7, 2024, 7 ("So the opportunity is huge, and that's really because this sports-focused platform is focused entirely on cord -- not cord-cutters but cord-nevers. So if you look at the American market, is roughly, say, 125 million households in America and roughly half of those are not within the traditional bundled cable ecosystem. And so the target for this product, which is going to be I think, incredibly innovative when you see it roll out is really that universe of, call it, 60 million-odd households that currently don't participate in the bundled cable and pay television ecosystem. So we think it's a tremendous opportunity."); "Warner Bros. Discovery, Inc. FQ4 2023 Earnings Call," *S&P Global Market Intelligence*, February 23, 2024, 11 ("And so it's a platform that this -- that the younger generation that is not subscribing, we're able to go after those that we're missing. We're missing those subscribers. The traditional cable industry is missing those subscribers…We don't see a lot of people unsubscribing to cable in order to get this. We're going after the 60 million plus, those that are not thinking about getting cable when they get their own apartments."); "The Walt Disney Co. Company Conference Presentation," *S&P Global Market Intelligence*, March 5, 2024, 8 ("The joint venture that we created with Fox and with Discovery Warner Bros., is an example of that. You've got a lot of people, young people who have not subscribed to the multichannel fat bundle. And you have a lot of people that used to be subscribers that lapsed. We want those -- we want them in. They want to watch sports. We're trying to provide them a less expensive, more focused opportunity for them. So it's -- I know a lot of folks claim that it was disruptive to the bundle. It's -- I'm not sure, by the way, the bundle was ever going to get some of those consumers back or the generation that our kids are part of get them into it. This is a way to do that.").

[383] The economics literature has studied the substantial contributions to consumer well-being of various new product introductions. Petrin (2002) discusses Chrysler's introduction of the minivan in 1984, noting that "[c]onsumers benefit from a greater breadth of choice in both the kind and quality of products over time;" Hausman (1997) discuss the introduction of new services in the telecommunications industry, commenting that "[c]onsumer welfare gains from the introduction of a successful new product are usually quite large;" and Hausman (1996) discusses how ignoring newly introduced goods leads to an overestimation of consumers' cost-of-living, noting that "[t]he impact of new goods on consumer welfare appears to be significant according to the demand estimates of this paper." Amil Petrin, "Quantifying the Benefits of New Products: The Case of the Minivan," *Journal of Political Economy* 110, no. 4 (August 2002): 705; Jerry A. Hausman, "Valuing the effect of regulation on new services in telecommunications," *Brookings papers on economic activity. Microeconomics* (1997): 15; Jerry A. Hausman, "Valuation of New Goods under Perfect and Imperfect Competition," in *The Economics of New Goods*, eds. Timothy F. Bresnahan and Robert J. Gordonn (Chicago: University of Chicago Press, 1996), 235.

associated with the additional variety provided by the new product. […] Second, the introduction of a new product creates increased competition for existing products."[384]

V.A.1. The JV is likely to put downward pressure on subscription prices for existing rival services, further benefiting consumers

(285) Evidence in this matter suggests [redacted] Internal documents from the JV members [redacted][385] This price is generally lower than those offered by existing vMVPDs and traditional MVPDs, as can be seen by looking at Figure 32 in Section III.B.2.[386]

(286) The Plaintiffs' experts agree that the JV will offer low prices but seem to view this as a negative rather than a positive. For example, Mr. Trautman states that "[t]he JV will use its competitive advantage in the marketplace (*e.g.*, the exclusive rights to sell a 'skinny' sports bundle) to undercut MVPD and vMVPD competitors on price."[387] Mr. Orszag also comments on how the JV's package and pricing will be attractive for consumers, noting that "[w]hile the proposed JV would offer 14 sports-focused channels as well as ESPN+ for an estimated $40-50 per month, for the 14 package/MVPD combinations presented in Table 3, customers would pay an average of $63 per month – or 26 percent more – to receive only seven of the JV stations, but 106 total channels, many of which customers may not desire."[388] When Mr. Orszag observes that [redacted][389] While low prices to consumers may be a negative

384 Jerry A. Hausman and Gregory K. Leonard, "The Competitive Effects of a New Product Introduction: A Case Study," *Journal of Industrial Economics* L, no. 3 (September 2002): 237–238.

385 TWDC_FUBO_00123237, at -240; WBD-00023279, at -280; FOX-057328, at -329; FOX-033353, at -355; *See* Cheesbrough Deposition, 80:7–80:20 [redacted] Deposition of John Nallen, June 27, 2024, [hereinafter "Nallen Deposition"], 192:16–20 [redacted]

386 Gino Amora, "H2 2023 Virtual Multichannel Packaging and Pricing Update," *S&P Global Market Intelligence*, January 29, 2024, https://www.capitaliq.spglobal.com/apisv3/spg-webplatform-core/news/article?id=80132033; Mau Rodriguez, "Pricing & Packaging: Traditional Video Price and Channel Changes," *S&P Global Market Intelligence*, https://www.capitaliq.spglobal.com/apisv3/spg-webplatform-core/news/article?id=81187933; Note: Sling TV prices are significantly lower than other services, but both their Blue and Orange tiers have significant programming gaps. The only way to view a significant number of the JV networks is to subscribe to Orange + Blue + the Sports Extra add-on, which costs $70 per month, but it still does not include ABC. "Watch Live Sports Games Online with Sling TV," Sling, accessed May 17, 2024, https://www.sling.com/programming/sports.

387 Updated Trautman Declaration, ¶ 49.

388 Updated Orszag Declaration, ¶ 101.

389 Updated Orszag Declaration, ¶ 107. [redacted]

for Fubo (and other downstream distributors that will compete with the JV), they are a boon for consumers, including those that do not end up switching away from their existing pay TV packages.

(287) Indeed, although vMVPDs and MVPDs generally offer a more comprehensive bundle of programming—including a more comprehensive bundle of sports programming—and so their prices are not directly comparable with those of the JV, to the extent that the creation of the JV puts pressure on vMVPDs, MVPDs, or other competitors for the sales of sports programming such as SVODs and sports-centric DTC services, to lower their price, consumers directly benefit. This is a benefit that neither Mr. Orszag nor Mr. Trautman have weighed in their analysis of the effects of the transaction.

V.B. Joint ventures and vertical integration often have procompetitive benefits

(288) A joint venture is an arrangement between different firms with a specific business objective. Joint ventures can be agreed upon between firms that vertically transact with each other or, as is the case in this matter, firms that compete horizontally. The potential procompetitive benefits of joint ventures are widely recognized by economists. For example:

- The FTC/DOJ *Competitor Collaboration Guidelines* state: "In order to compete in modern markets, competitors sometimes need to collaborate. Competitive forces are driving firms toward complex collaborations to achieve goals such as expanding into foreign markets, funding expensive innovation efforts, and lowering production and other costs. Such collaborations often are not only benign but procompetitive… The Agencies recognize that consumers may benefit from competitor collaborations in a variety of ways… Consumers may benefit from these collaborations as the participants are able to lower prices, improve quality, or bring new products to market faster."[390]
- O'Brien and Salop (2000) observe that "[j]oint ventures potentially can lead to a variety of efficiency benefits. These potential benefits include lower costs and superior products from synergies created by integrating the parents' technologies, intellectual property rights, and know-how. Joint ventures also can lead to elimination of duplicative costs and efforts and efficient risk sharing."[391]

(289) Because the proposed JV will create a new downstream distributor that will be used by the three upstream JV members, the JV also has the potential to offer the efficiency gains of vertical integration.

390 *Competitor Collaboration Guidelines*, 1, 6.

391 Daniel P. O'Brien and Steven C. Salop, "Competitive Effects of Partial Ownership: Financial Interest and Corporate Control," *Antitrust Law Journal* 67, no. 3 (2000): 600.

(290) In the present matter, two benefits of vertical integration are particularly relevant: the elimination of double marginalization and enhanced investment incentives.

(291) "Double marginalization" occurs when an upstream firm and a downstream firm set their prices independently. In the present case, this would involve an upstream programmer setting an affiliate fee and then a downstream distributor setting its packages price(s) to consumers in part based on that fee.

(292) When the programmer and distributor are independent firms, each cares only about its own profit. As a result, each firm will fail to internalize the negative impact of a higher price on the profits of the other firm.[392] Specifically, the programmer does not care that a higher affiliate fee lowers the profit of the distributor. The distributor does not care that a higher package price, by lowering subscriptions, lowers the profits of the programmer (through lower affiliate fees and lower advertising revenue).

(293) In contrast, vertical integration of these two firms could lead the distributor to charge a lower package price because it then also takes into account the impact on its programming division. Alleviating the double marginalization problem then benefits consumers and is likely to lead to higher overall output (here, subscriptions). Documents produced by the JV members in the ordinary course of business are consistent with this idea, noting that [redacted][393]

(294) Additionally, vertical integration can improve investment incentives. In the present matter, new entry by a third-party distributor would not only create benefits for consumers (as I discussed in Section V.A), but also would benefit programmers by providing a new source of distribution for their content and generating greater downstream competition with lower downstream prices (which will increase subscriptions and therefore affiliate fees and advertising revenue). However, an independent distributor will not consider the benefit to programmers in deciding whether to enter. As a result, upstream programmers may find it worthwhile to create a new downstream product that benefits consumers when an independent distributor would not.

[392] James C. Cooper, et al., "Vertical Antitrust Policy as a Problem of Inference," *International Journal of Industrial Organization* 23, no. 7–8 (September 2005): 643 ("The 'double markup' problem arises when producers with market power at adjacent stages of production… set prices independently. The resulting prices are too high, and the corresponding outputs too low, to maximize joint profits.").

[393] In a September 21, 2023 email, James Pitaro, Chairman of ESPN, wrote that the JV is [redacted] TWDC_FUBO_00104131 at -132; *See also* WBD-00021826 at -826, a September 26, 2023 email from Luis Silberwasser, Chairman and CEO of WBD Sports, to executives at WBD [redacted] These documents are consistent with JV member financial models that show [redacted] *See, e.g.*, TWDC_FUBO_00123219, at -223; WBD-00023204, at -207; As discussed in Section IV.A.2, [redacted]

(295) Documents available in this case show that [redacted][394] A third-party distributor might well not find [redacted][395] This suggests that the JV will introduce to the industry a product that would otherwise be unavailable to consumers.

V.C. Mr. Orszag incorrectly ignores potential procompetitive benefits from the JV and wrongly asserts that the JV harms competition in a market for sale of pay TV services to consumers

(296) Despite the consensus among economists that joint ventures and vertical integration can often lead to consumer benefits, and the evidence that this JV will bring a new, low-priced, differentiated product to the market that will put downward pressure on the pricing of other downstream products, Mr. Orszag largely ignores the possibility of procompetitive benefits from the JV in his analysis.

(297) He gives two reasons for this. First, he claims that "the proposed JV itself is marketplace evidence that the contractual restrictions imposed upon Fubo by Defendants are not the efficient method of distributing Defendants programming networks."[396] This seems to be a point more about the JV members' and other upstream programmers' historic bundling practices, which have been commonly used by programmers for decades and to my understanding are not directly at issue in this PI proceeding, than about possible efficiencies from the creation of the JV.[397]

(298) I also note that even if all JV members agreed to the unbundling of their networks, Fubo and other distributors still would not be able to offer a package with the exact list of networks that the JV offers

394 *See, e.g.*, FOX-009874, at -881–885; FOX-057328, at -343; TWDC_FUBO_00123219, at -223; WBD-23204, at -207. [redacted].

395 *See* discussion in Section II.A.4.f.

396 Updated Orszag Declaration, ¶ 122.

397 Brad Adgate, "How Streaming Services Are Bundling Like Cable Networks Used To," *Forbes*, https://www.forbes.com/sites/bradadgate/2022/11/07/the-bundling-of-streaming-video-has-arrived/; In my analysis for this PI hearing, I assume that the JV members' current bundling practices in the licensing of their programming to MVPDs and vMVPDs, (including Fubo) remain in place. I do so because Mr. Orszag describes these bundling practices as worsening the impact of the JV. (In ¶ 93 of his Updated Declaration Mr. Orszag states that "Fubo would be harmed by Raptor in the market for the sae of pay TV services. This is because the Defendants' JV--in conjunction with their carriage agreements--will reduce Fubo's ability to compete effectively to attract pay TV customers, thereby reducing price competition between vMVPD and MVPD providers that benefits consumers." Then, in ¶ 105 he states that "one way to mitigate the anticompetitive harm of Raptor would be to prohibit Defendants from limiting the flexibility of Fubo and others in how they sell packages of the Defendants' programming."). Thus, my conclusion that the JV is procompetitive, not anticompetitive, in the presence of these bundling restrictions also indicates that the JV procompetitive even if this bundling were not present.

because of the provisions in their contracts with other programmers.[398] For example, [redacted][399] [redacted][400] [redacted][401] The JV does not face similar issues and is able to introduce an otherwise unavailable product to the downstream market, which embodies the procompetitive benefits of the JV.

(299) Mr. Orszag also argues that although the JV members "may claim" that consumers will benefit from reduced "friction" in the viewing experience from having different channels bundled together, that such benefits should not be attributed to the JV because other independent services have developed ways to search for sports and other content across various competing apps.[402] I have two responses. First, none of the arguments I describe above about procompetitive benefits of the JV rely on this particular benefit, though it could well be that the JV brings benefits to consumers including the ease of searching and switching across the JV's particular aggregation of sports channels. Second, if Mr. Orszag intends to say that bundles do not offer value above and beyond the value of the channels they contain, it is difficult to see the value a firm like Fubo brings to the market, since it is essentially an aggregator of networks on one service that can all be viewed in other ways. In this case either Mr. Orszag fails to understand the value a distributor creates for consumers by offering a bundle or Fubo has no long-term prospects for success.

398 Mathers Deposition, 183:10–16 [redacted]

399 [redacted] FUBO_0168358, at -367; [redacted] FUBO_0101226, at -227.

400 For example, [redacted] FUBO_0101226, at -227; [redacted] FUBO_0168496, at -506; [redacted] FUBO-0168358, at -388; FUBO-0100773, at -810.

401 [redacted] FUBO_0101226 at -27 and FUBO_0101468 at -468, 478.

402 Updated Orszag Declaration, ¶ 123.

VI. Fubo's claims regarding irreparable harm are inconsistent with economics and the evidence

(300) As I have discussed throughout this report, my analysis and review of the available evidence indicate that the creation of the JV is procompetitive, not anticompetitive. Based on my economic analysis, Fubo is thus unlikely to succeed in proving that the JV violates the antitrust laws, which counsel has instructed me is one legal criterion for evaluating a request for a preliminary injunction. Counsel has also instructed me that Fubo must establish it would suffer "irreparable harm" without a preliminary injunction that prevents the creation of the JV.

(301) It is my understanding that, to establish irreparable harm, the party seeking a preliminary injunction must show that any harm it suffers before the resolution of a trial on the merits cannot adequately be remedied, for instance by an award of monetary damages, should the Court rule in Plaintiff's favor.

(302) Fubo CFO John Janedis asserts in his declaration that [redacted][403] The implication is that Fubo would be irreparably harmed by the creation of the JV [redacted]

(303) While I do not opine directly on the solvency or insolvency of Fubo either now or in the future, in this section I evaluate other aspects of the argument that the JV should be enjoined because Fubo would otherwise suffer "irreparable harm." I make the following points:

- The JV may cause Fubo to lose some subscribers, as would any new downstream entrant, but there is no evidence that this subscriber loss or resulting impact on Fubo would be due to the formation of the JV itself or the purported anticompetitive impacts Mr. Orszag asserts, rather than the procompetitive effects of the entry of any additional competitor marketing a new, differentiated product desired by consumers.
- Existing carriage agreements mean that [redacted]
- Mr. Janedis's [redacted] In particular, [redacted]

[403] Declaration of John Janedis, April 8, 2024 [hereinafter, "Janedis Declaration"], ¶¶ 10, 14.

- As I discussed in Section IV.A, the transaction is not a merger, and thus does not create an "unscrambling of the eggs" difficulty if it is later found to be anticompetitive.
- Churn between different distribution platforms is high. Any subscribers Fubo initially loses from the creation of the JV are not permanent and could return to Fubo if Fubo improved its product, if the JV did not compete vigorously downstream, or if the JV were later dissolved.

VI.A. Any impact the JV has on Fubo cannot be attributed to anticompetitive actions

VI.A.1. Any negative impact on Fubo arising from the fact that the JV is introducing a new differentiated product for consumers does not represent harm to Fubo attributable to anticompetitive actions

(304) In Section V, I discussed the procompetitive benefits that the JV brings to the market for video distribution services. The JV provides consumers with the ability to subscribe to a package that includes all of the JV members' (English-language) networks that contain sports programming at a lower price than the typical comprehensive pay TV bundle. In doing so it provides benefits to consumers who switch to it, and likely increases competition and lowers prices for the consumers who do not switch to it.

(305) Firms faced with entry by new differentiated products can experience a loss of customers, but that is the very essence of the competition the antitrust laws seek to promote. Contrary to Mr. Orszag's claims, the JV does not harm competition among pay TV distributors, rather the JV enhances it.[404]

VI.A.2. There is no basis to conclude that the JV would cause any harm to Fubo attributable to anticompetitive actions

(306) Mr. Orszag claims that Fubo will be harmed if the JV raises the prices of sports programming to Fubo and other vMVPDs and MVPDs.[405]

(307) However, as I discussed in Section IV, the JV does not harm this licensing competition: it does not create the joint market power for the JV members, nor has Mr. Orszag provided any analysis to show that the JV will create unilateral incentives for the JV members to raise the prices of their sports network programming to MVPDs and vMVPDs. I also explained in Section IV.B how existing

[404] Updated Orszag Declaration, § III.A, ¶ 93 ("Fubo would be harmed by Raptor in the market for pay TV services. This is because the Defendants' JV – in conjunction with their carriage agreements – will reduce Fubo's ability to compete effectively to attract pay TV customers.").

[405] Updated Orszag Declaration, § III ("THE PROPOSED JOINT VENTURE WILL HARM FUBO, OTHER VMVPDS AND MVPDS AND COMPETITION BY RAISING THE PRICE OF SPORTS NETWORKS").

carriage agreements mean that [redacted] (*see* Figure 44 and Figure 45 in Section IV.B.3). And, even if hypothetically [redacted]

VI.B. Mr. Janedis offers an unsupported analysis of harm to Fubo

(308) Mr. Janedis claims that the launch of the JV [redacted][406] This conclusion is based entirely on [redacted][407]

(309) Notably, [redacted][408] Thus, [redacted][409] As I remarked above, business losses resulting from entry by a rival offering a new differentiated product is the essence of competition.

(310) With respect to [redacted][410] [redacted] Put differently, [redacted][411]

406 Janedis Declaration, ¶ 10.

407 Janedis Declaration, ¶ 11.

408 [redacted] Janedis Declaration, Exhibit 1; *see also* FUBO_0165281 (content_detail) [redacted] FUBO_0168457 (content_detail) [redacted] FUBO_0168459 (content_detail) [redacted]

409 [redacted] TWDC_FUBO_00082294, at -306; FOX-022688, at -691.

410 Janedis Declaration, ¶ 19.

411 *See* Figure 46. I created four copies of FUBO_0165281, [redacted]

(311) Figure 46 below shows that [redacted] Specifically, [redacted]

[redacted]

(312) [redacted][412] [redacted][413] [redacted][414] [redacted][415]

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412 Janedis Declaration, ¶ 21.

413 Janedis Declaration, ¶ 22. [redacted]

414 Janedis Declaration, Exhibit 1 [redacted]

415 *See* Horihuela Deposition, 147:3–149:7 [redacted]

(313) Mr. Janedis's assumption is problematic for several reasons. First, Mr. Janedis ignores [redacted] In fact, [redacted]

(314) Second, [redacted][416]

(315) [redacted][417]

(316) Figure 47 compares [redacted][418] [redacted]

[redacted] Deposition of John Janedis, June 25, 2024, [hereinafter, "Janedis Deposition"], 46:3–9 [redacted]

416 The Janedis Declaration describes [redacted] (Janedis Declaration, Exhibit 1) [redacted] However, in his deposition, Mr. Janedis stated: [redacted] Janedis Deposition, 117:18–22.

417 [redacted]

418 Fubo only carries Disney's and Fox's JV networks.

[redacted]

(317) [redacted][419] [redacted][420]

[419] Updated Orszag Declaration, ¶ 41[redacted]

[420] *See also* Horihuela Deposition, 41:7–21 [redacted]

(318) Third, [redacted][421] [redacted][422] [redacted][423]

(319) Similarly, [redacted][424] [redacted][425]

(320) Given these points, [redacted][426]

VI.C. Fubo can likely regain any lost subscribers if the JV is dissolved

(321) As noted above, the JV is not a merger, and thus does not create an "unscrambling of the eggs" difficulty if it is later found to be anticompetitive. My understanding is that the JV members retain

[redacted]

421 FUBO_0165271 (Compare JV), A11–C11.

422 FUBO_0165242, at -266. Mr. Janedis testified in deposition that [redacted] Janedis Deposition, 331:25–332:03; [redacted]

423 NBC-00001500, at slide 4, 6. [redacted]

424 TWDC_FUBO_00123202 (Raptor Model), at G249; [redacted] WBD-00023363 (JV_Engine), at FV12.

425 *See* the file "01 Distributor subscriber shares.xlsx" in my backup for the calculation of Fubo's share of MVPD and vMVPD subscribership.

426 Janedis Declaration, ¶ 10.

independent control of their licenses. Moreover, I am aware of no reason the JV could not be dissolved or divested at a later point if found to be anticompetitive.

(322) In addition, Fubo will likely be able to regain any subscribers lost to the JV, if the JV were prohibited. As I discuss in Section II, the video content creation and distribution industry is characterized by growing consumer choice and competition among many new streaming options. Subscribers have shown a willingness to add and drop subscriptions, and to purchase multiple subscriptions. In this context, it is common for Fubo subscribers to add, drop, and reactivate their subscriptions. Thus, to the extent Fubo lost subscribers to the JV, and the JV were later prohibited, empirical evidence regarding reactivations indicate that Fubo could recapture subscribers. For example, Mr. Orszag himself (citing the Declaration of Mr. Horihuela) notes that Fubo's customers often cancel their subscriptions temporarily between seasons.[427] Fubo's financial statements make this point as well, noting that seasonality in subscribing is tied largely to football and other large sports events.[428]

(323) For example, Figure 48 shows that [redacted]

[427] Updated Orszag Declaration, ¶ 61.

[428] Fubo, *Form 10-K*, March 4, 2024, 8 ("We generate significantly higher levels of revenue and subscriber additions in the third and fourth quarters of the year. This seasonality is driven primarily by an influx of new subscribers at the start of the National Football League and college football seasons.").

[redacted]

(324) [redacted][429] Figure 49 shows a [redacted]

[429] [redacted] Janedis Deposition, at 51:5–9.

[redacted]

Michael D. Whinston, PhD

July 10, 2024
Date

Updated on July 19, 2024

Appendix A. Curriculum vitae

A.1. Summary

Michael Whinston is the Sloan Fellows Professor of Management at the MIT Sloan School of Management and Professor of Economics in the MIT Department of Economics. He is a leading expert in the fields of antitrust economics and regulation, industrial organization, and microeconomics. Dr. Whinston has consulted in cases involving a range of industries and issues and served as a neutral expert in a price-fixing case.

Prior to joining the faculty at MIT in 2013, Dr. Whinston taught at Northwestern University and at Harvard University. He has held visiting positions at Oxford University, the University of Chicago, and Yale University, and also has served as a visiting economist in the Antitrust Division at the US Department of Justice.

Dr. Whinston has been awarded many honors over his academic career, including multiple National Science Foundation research grants and the 2008 Compass Lexecon Prize for his paper titled "Antitrust in Innovative Industries." He has been named a Who's Who Legal Competition Economist since 2011 and recognized as a Who's Who Legal Competition Thought Leader since 2019. Dr. Whinston is a Research Associate at the National Bureau of Economic Research, a fellow of the American Academy of Arts and Sciences, a fellow of the Econometric Society, and an Alfred P. Sloan research fellow.

A.2. Education

- PhD, Economics, Massachusetts Institute of Technology
- MBA, Wharton School, University of Pennsylvania
- BS, Economics, Wharton School, University of Pennsylvania

A.3. Testifying experience

- In *United States et al. v. Google LLC*, submitted expert reports and provided deposition and trial testimony on behalf of the Department of Justice (DOJ) before the US District Court for the District of Columbia. The Department alleged that Google foreclosed competition for internet

search by denying general search engine competitors access to vital distribution channels and scale, thereby thwarting innovation and harming consumers and advertisers.

- In *In re Dealer Management Systems Antitrust Litigation*, submitted an expert rebuttal report on behalf of CDK Global. Plaintiff parties in the automotive dealer retail software industry brought an action against CDK and Reynolds, alleging that CDK and Reynolds colluded to exclude independent data integrators from the markets for data integration services for their respective dealer management systems, including entering into a set of agreements that the parties alleged were anticompetitive. Reviewed and evaluated liability opinions of three plaintiff expert reports and analyzed the conduct of CDK and Reynolds to assess the merits of plaintiffs' allegations.
- In the matter *U.S. v. AB Electrolux, Electrolux North America, Inc., and General Electric Company*, provided expert analysis and testimony on behalf of Department of Justice (DOJ) before the US District Court for the District of Columbia in support of the Antitrust Division's successful challenge of Electrolux's proposed acquisition of General Electric's major appliance business.
- On behalf of DuPont, analyzed likely effects of its proposed merger with Dow Chemical on innovation in markets for agricultural products.
- Served as liability expert for DuPont in its litigation against Monsanto regarding alleged antitrust and intellectual property violations. Monsanto originally sued DuPont and its Pioneer subsidiary for infringing Monsanto's Roundup Ready soybean patent. DuPont countersued, accusing Monsanto of antitrust violations and of fraudulently obtaining the patent. The parties agreed to dismiss antitrust and patent lawsuits filed against each other as part of a broader licensing agreement reached between the two agricultural biotechnology giants.
- Submitted a report and provided deposition testimony in *In re Cathode Ray Tube (CRT) Antitrust Litigation* regarding certain defendants' incentives to participate in the alleged price-fixing conspiracy.
- Submitted reports and testified at preliminary and final International Trade Commission hearings in the matter *Certain Oil Country Tubular Goods* (OCTG) (USITC Inv. Nos. 701-TA-499-500 and 731-TA-1215-1223) demonstrating the deleterious effects of unfairly traded imports of OCTG, including lower levels of investment, profitability, and employment in the domestic oil industry.
- Served as expert for the Competition Bureau of Canada in the proposed acquisition of the Toronto Stock Exchange (TMX), its rival electronic stock exchange Alpha, and the Canadian Depository for Securities Limited (CDS) by TMX Group Limited (formerly Maple Group Acquisition Corporation). Analyzed the extent to which the combined exchanges and depository would be able to exercise market power.

- Served as expert for the Competition Bureau of Canada in the proposed BHP Billiton/PotashCorp merger. Analyzed geographic pricing patterns to determine the degree to which foreign competitors would constrain the merged firm's ability to raise prices in Canada following the merger.
- Served as principal economic expert in the Department of Justice investigation of Ticketmaster's contracting practices, analyzing Ticketmaster's use of exclusive contracts with music venues and evaluating their potential for anticompetitive harm and possible efficiency justifications.
- Retained as an expert by the Federal Trade Commission in the matter *FTC v. Intel*, investigating whether Intel engaged in illegal exclusionary conduct toward Advanced Micro Devices (AMD).
- Provided a report and deposition testimony for several direct and indirect plaintiffs in the matter *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation* analyzing supply, demand, and overcharges.
- Testified before the Canadian Competition Tribunal on entry barriers and exclusive contracts in the Superior/ICG Propane merger.
- Served as court-appointed neutral expert for US District Court Judge Letts in a CD price-fixing case. Supervised the expert discovery and report process and advised Judge Letts on the merits of the case.
- While visiting at the Department of Justice, served as principal economic consultant in the Department's investigation into the proposed merger of Starkist and Bumble Bee Tuna. Conducted econometric analysis of the elasticity of demand for tuna. The merger was ultimately abandoned after the Division noted its concerns to the parties.
- On behalf of the defendant, provided deposition testimony in the matter *Phelan v. Newport Imports*, a case alleging price fixing of Ferraris. Demonstrated that the prices of Ferraris followed the same general trends as other collectibles during the relevant period.

A.4. Publications

A.4.a. Books

- *Microeconomics*, 2nd ed. (with B. Douglas Bernheim). New York: McGraw-Hill, 2013.
  - *Microeconomics* (with B. Douglas Bernheim). New York: McGraw-Hill, 2008.
- *Lectures on Antitrust Economics*. Cambridge, MA: MIT Press, 2006.
- *Microeconomic Theory* (with Andreu Mas-Colell and Jerry R. Green). New York: Oxford University Press, 1995.

A.4.b. Handbook chapters

- "Structural Empirical Analysis of Contracting in Vertical Markets (with Robin Lee and Ali Yurukoglu). In Handbook of Industrial Organization, Vol. 4. edited by K. Ho, A. Hortascu, and A. Lizzeri, Amsterdam: Elsevier, 2021.
- "Property Rights" (with Ilya R. Segal). In Handbook of Organizational Economics, edited by Robert Gibbons and John Roberts, 100–58. Princeton University Press, 2013.
- "Antitrust Policy toward Horizontal Mergers." In Handbook of Industrial Organization. Vol. 3, edited by Mark Armstrong and Robert Porter, 2371–2440. Amsterdam: Elsevier, 2007.

A.4.c. Journal articles and book chapters

- "Optimal Long-Term Health Insurance Contracts: Characterization, Computation, and Welfare Effects" (with Soheil Ghili, Ben Handel, and Igal Hendel). Review of Economic Studies. Forthcoming.
- "Concentration Thresholds for Horizonal Mergers" (with Volker Nocke). American Economic Review 112 (2022): 915–948.
- "Optimal Targeted Lockdowns in a Multi-Group SIR Model" (with Daron Acemoglu, Victor Chernozhukov, and Ivan Werning). American Economic Review Insights 3 (2021): 487–502.
- "Internal versus External Growth in Industries with Scale Economies: A Computational Model of Optimal Merger Policy" (with Ben Mermelstein, Volker Nocke, and Mark A. Satterthwaite). *Journal of Political Economy* 128, no. 1 (January 2020).
    - Awarded the 2014 Lanzilotti Prize.
- "AT&T/Time Warner and Antitrust Policy Toward Vertical Mergers" (with Gregory S. Crawford, Robin S. Lee, and Ali Yurukoglu. CPI Antitrust Chronicle (July 2019).
- "Electrolux's Attempted Acquisition of GE's Appliance Business: U.S. v. AB Electrolux and General Electric" (with T. Scott Thompson). In *The Antitrust Revolution*, 7th ed., edited by John E. Kwoka, Jr., and Lawrence J. White. New York: Oxford University Press, 2018.
- "The Welfare Effects of Vertical Integration in Multichannel Television Markets" (with Gregory S. Crawford, Robin S. Lee, and Ali Yurukoglu). *Econometrica* 86 (2018): 891–954.
    - Awarded 2019 Best Paper prize of the Association of Competition Economics.
- "Property Rights and the Efficiency of Bargaining" (with Ilya Segal). *Journal of the European Economic Association* 14, no. 6 (2016): 1287–1328.

- "Equilibria in Health Exchanges: Adverse Selection vs. Reclassification Risk" (with Benjamin R. Handel and Igal Hendel). *Econometrica* 83 (2015): 1261–1313.
  - Awarded the 2016 Frisch Medal.
- "Some Reflections on Conditional Pricing Practices." Presentation summary of Concurrences journal dinner in honor of Howard Shelanski, September 11, 2014.
- "The Efficiency of Bargaining Under Divided Entitlements" (with Ilya Segal). *University of Chicago Law Review* 81, no. 1 (2014): 273–89.
- "Does Retailer Power Lead to Exclusion?" (with Patrick Rey). *RAND Journal of Economics* 44, no. 1 (2013): 75–81.
- "Merger Policy with Merger Choice" (with Volker Nocke). *American Economic Review* 103 (2013): 1006–33.
- "Property Rights" (with Ilya R. Segal). In *Handbook of Organizational Economics*, edited by Robert Gibbons and John Roberts, 100–58. Princeton University Press, 2013.
- "A Simple Status Quo that Ensures Participation (with Application to Efficient Bargaining)" (with Ilya R. Segal). *Theoretical Economics* 6 (2011): 109–25.
- "Dynamic Merger Review" (with Volker Nocke). *Journal of Political Economy* 118 (2010): 1200–51.
- "Taking the Dogma Out of Econometrics: Structural Modeling and Credible Inference" (with Aviv Nevo). *Journal of Economic Perspectives* 24 (2010): 69–82.
- "Antitrust in Innovative Industries" (with Ilya R. Segal). *American Economic Review* 97 (2007): 1703–30.
  - Awarded the 2008 Compass Lexecon Prize.
- "Antitrust Policy toward Horizontal Mergers." In *Handbook of Industrial Organization*. Vol. 3, edited by Mark Armstrong and Robert Porter, 2371–2440. Amsterdam: Elsevier, 2007.
- "Public vs. Private Enforcement of Antitrust Law: A Survey." *European Competition Law Review* 2007, 323–32.
- "On the Transaction Cost Determinants of Vertical Integration." *Journal of Law, Economics, and Organization* 19 (2003): 1–23.
- "Robust Predictions for Bilateral Contracting with Externalities" (with Ilya R. Segal). *Econometrica* 71 (2003): 757–91.
- "The Mirrlees Approach to Mechanism Design with Renegotiation (with Applications to Hold-up and Risk-Sharing)" (with Ilya R. Segal). *Econometrica* 70 (2002): 1–45.

- "Assessing the Property Rights and Transaction-Cost Theories of Firm Scope." *American Economic Review: Papers and Proceedings* 91 (2001): 184–88.
  - Reprinted in *The International Library of the New Institutional Economics*. Vol. 7, edited by Claude Menard and Mary Bohman, chap. 13. Cheltenham, UK: Edward Elgar Publishing, 2005.
- "Exclusivity and Tying in U.S. v. Microsoft: What We Know and Don't Know." *Journal of Economic Perspectives* 15 (2001): 63–80.
  - Reprinted in *Recent Developments in Monopoly and Competition Policy*, edited by George Norman, chap. 22. Cheltenham, UK: Edward Elgar Publishing, 2008.
- "Exclusive Contracts and Protection of Investments" (with Ilya R. Segal). *RAND Journal of Economics* 31 (2000): 603–33.
- "Naked Exclusion: Comment" (with Ilya R. Segal). *American Economic Review* 90 (2000): 296–309.
- "Exclusive Dealing" (with B. Douglas Bernheim). *Journal of Political Economy* 106 (1998): 64–103.
  - Reprinted in *Recent Developments in Monopoly and Competition Policy*, edited by George Norman, chap. 21. Cheltenham, UK: Edward Elgar Publishing, 2008.
- "Incomplete Contracts and Strategic Ambiguity" (with B. Douglas Bernheim). *American Economic Review* 88 (1998): 902–32.
  - Reprinted in *Institutional Law and Economics*, edited by Pablo T. Spiller. Cheltenham, UK: Edward Elgar Publishing (forthcoming).
- "On the Efficiency of Privately Stipulated Damages for Breach of Contract: Entry Barriers, Reliance, and Renegotiation" (with Kathryn E. Spier). *RAND Journal of Economics* 26 (1995): 180–202.
  - Reprinted in *Economics of Contract Law*, edited by Douglas G. Baird, chap. 8. Cheltenham, UK: Edward Elgar Publishing, 2007.
- "Entry and Competitive Structure in Deregulated Airline Markets: An Event Study Analysis of People Express" (with Scott C. Collins). *RAND Journal of Economics* 23 (1993): 445–62.
  - Reprinted in *Empirical Industrial Organization*. Vol. 2, edited by Paul L. Joskow and Michael Waterson, chap. 3. Cheltenham, UK: Edward Elgar Publishing, 2004.
- "Incomplete Contracts, Vertical Integration, and Supply Assurance" (with Patrick Bolton). *Review of Economics Studies* 60 (1993): 121–48.

- Reprinted in *The Economics of Contracts.* Edited by Patrick Bolton, chap. 17. Cheltenham, UK: Edward Elgar Publishing, 2009.

- "Patent Expiration, Entry, and Competition in the U.S. Pharmaceutical Industry: An Exploratory Analysis" (with Richard E. Caves and Mark A. Hurwitz). *Brookings Papers on Economic Activity, Microeconomics* (1991): 1–48.
- "The 'Foreclosure' Effects of Vertical Mergers" (with Patrick Bolton). *Journal of Institutional and Theoretical Economics* 147 (1991): 207–26.
- "Multimarket Contact and Collusive Behavior" (with B. Douglas Bernheim). *RAND Journal of Economics* 21 (1990) 1–26.
  - Reprinted in *Cartels*, edited by Margaret C. Levenstein and Stephen W. Salant, chap. 24. Cheltenham, UK: Edward Elgar Publishing, 2007.
  - Reprinted in *Pricing Tactics, Strategies, and Outcomes*, edited by Michael Waldman and Justin P. Johnson, chap. 23. Cheltenham, UK: Edward Elgar Publishing, 2007.
- "Tying, Foreclosure, and Exclusion." *American Economic Review* 80 (1990): 837–59.
  - Reprinted in *Economics of Antitrust Law*, edited by Benjamin Klein and Andres V. Lerner, chap. 7. Cheltenham, UK: Edward Elgar Publishing, 2008.
  - Reprinted in *Pricing Tactics, Strategies, and Outcomes*, edited by Michael Waldman and Justin P. Johnson, chap. 15. Cheltenham, UK: Edward Elgar Publishing, 2007.
- "Multiproduct Monopoly, Commodity Bundling, and Correlation of Values" (with R. Preston McAfee and John McMillan). *Quarterly Journal of Economics* 104 (1989): 371–84.
  - Reprinted in *Pricing Tactics, Strategies, and Outcomes*, edited by Michael Waldman and Justin P. Johnson, chap. 14. Cheltenham, UK: Edward Elgar Publishing, 2007.
- "Exit with Multiplant Firms." *RAND Journal of Economics* 19 (1988): 568–88.
- "Coalition-Proof Nash Equilibria I: Concepts" (with B. Douglas Bernheim and Bezalel Peleg). *Journal of Economic Theory* 42 (1987): 1–12.
- "Coalition-Proof Nash Equilibria II: Applications" (with B. Douglas Bernheim). *Journal of Economic Theory* 42 (1987): 13–29.
- "Common Agency" (with B. Douglas Bernheim). *Econometrica* 54 (1986): 923–42.
- "Free Entry and Social Inefficiency" (with N. Gregory Mankiw). *RAND Journal of Economics* 17 (1986): 48–58.
- "Menu Auctions, Resource Allocation, and Economic Influence" (with B. Douglas Bernheim). *Quarterly Journal of Economics* 101 (1986): 1–31.

  - Reprinted in *The Economics of Contracts*, edited by Patrick Bolton, chap. 6. Cheltenham, UK: Edward Elgar Publishing, 2009.

- "Common Marketing Agency as a Device for Facilitating Collusion" (with B. Douglas Bernheim). *RAND Journal of Economics* 16 (1985): 269–81.

  - Reprinted in *Cartels*, edited by Margaret C. Levenstein and Stephen W. Salant, chap. 7. Cheltenham, UK: Edward Elgar Publishing, 2007.

- "Moral Hazard, Adverse Selection, and the Optimal Provision of Social Insurance." *Journal of Public Economics* 22 (1983): 49–71.

A.4.d. Other

- "Concentration Thresholds for Horizonal Mergers" (with Volker Nocke). American Economic Review 112 (2022): 915–948.
- "Tying with Network Effects" (with Jay Pil Choi and Doh-Shin Jeon). Working paper, April 3, 2023.

- "Concentration Thresholds for Horizonal Mergers" (with Volker Nocke). American Economic Review 112 (2022): 915–948.

- "Optimal Targeted Lockdowns in a Multi-Group SIR Model" (with Daron Acemoglu, Victor Chernozhukov, and Iván Werning). NBER Working Paper 27102, May 2020.

- "Some Reflections on Conditional Pricing Practices." Presentation summary of Concurrences journal dinner in honor of Howard Shelanski, September 11, 2014.

- Comment on Carl Shapiro's "Did Arrow Hit the Bull's Eye." In *The Rate and Direction of Inventive Activity Revisited*. Edited by Josh Lerner and Scott Stern. NBER Conference Report, University of Chicago Press, 2012.

- "The Ethyl Corporation in 1979." Harvard Business School Case Study No. N9-388-075. March 6, 1990.

A.5. Speaking engagements

- Speaker, Northwestern Conference on Antitrust Economics and Competition Policy, 2011, 2019 and 2022

- Panelist, GCR Live: DC Workshop, 2019

- Panelist, ABA Antitrust Law Spring Meeting, 2018

- Speaker, Hal White Antitrust Conference, 2015, 2016, and 2018

- Keynote speaker, International Industrial Organization Conference, 2016
- Keynote speaker, International Society for New Institutional Economics Annual Meeting, 2015
- Speaker, ABA Section of Antitrust Law Spring Meeting, 2015
- Speaker, Georgetown Law Global Antitrust Enforcement Symposium, 2014
- Speaker, Joint FTC/DOJ Workshop on Conditional Pricing Practices, 2014
- Keynote speaker, European Association for Research in Industrial Economics Conference, 2013
- Keynote speaker, German Economic Association Conference, 2013
- Keynote speaker, Competition and Regulation European Summer School Conference, 2010
- Yale University, Cowles Foundation visiting lecturer, 2005–2006
- Department of Justice (lecture series to DOJ economists), 2004
- University of Texas, Austin (lecture series to graduate students), 2004
- Inaugural Cairoli Lectures, Universidad Torcuato di Tella, Argentina, 2000
- University of Toronto (lecture series to graduate students), 1999
- NAKE Lectures (lecture series to Dutch graduate students), 1998

A.6. Professional experience

- Massachusetts Institute of Technology
  - Professor of Economics and Sloan Fellows Professor of Management, Department of Economics and Sloan School of Management, 2013–present
- Bates White Economic Consulting
  - Partner, 2013–present
- Northwestern University
  - Robert E. and Emily H. King Professor of Business Institutions, Department of Economics, 1998–2013
  - Co-director, Center for the Study of Industrial Organization, 1999–2013
  - Courtesy appointment, Department of Management and Strategy, Kellogg School of Management, 2003–2013
  - Courtesy appointment, School of Law, 1998–2013
- Harvard University

- Professor of Economics, 1991–1998
- Frederick S. Danziger Associate Professor of Economics, 1988–1991
- Assistant Professor of Economics, 1984–1988

- Visiting positions
  - BP Visiting Professor, London School of Economics, Spring 2020
  - Trione Visiting Professor, Stanford University, Fall 2019
  - Leverhulme Trust Visiting Professorship, Oxford University/Nuffield College, 2008–2009
  - Visiting Professor, Graduate School of Business, University of Chicago, Fall 2002
  - Olin Visiting Professor and Fellow at the Center for the Study of the Economy and the State, Graduate School of Business, University of Chicago, 1999–2000
  - Department of Economics, Northwestern University, 1997–1998
  - Antitrust Division, US Department of Justice, April–July 1988
  - Department of Economics, Yale University, Fall 1989

A.7. Honors and distinctions

- *Who's Who Legal* Competition Economist, 2011–present
  - Thought Leader in Competition, 2019–present
- Outstanding Antitrust Litigation Achievement in Economics, American Antitrust Institute, October 2016
- Fellow, American Academy of Arts and Sciences, 2008–present
- National Science Foundation Research Grants, 1986–1988, 1990–1994, 2000–2006, 2010–2013, 2013–2016
- Fellow, Econometric Society, 1993–present
- Frisch Medal from the Econometric Society, 2016
- Industrial Organization Society Distinguished Fellow Award, 2016
- Lanzillotti Prize for "Best Paper in Antitrust Economics," 2013
- Compass Lexecon Prize for "Most significant contribution to the understanding and implementation of competition policy," 2008
- Fellow, Center for Advanced Studies in the Behavioral Sciences, 1993–1994

- Alfred P. Sloan Research Fellow, 1990–1992

A.8. Professional activities

- Member, Editorial Board, *American Economic Journals: Microeconomics*, 2007–present
- Program Committee, Utah Business Economics Conference, 2007–2008
- Co-Director, Center for the Study of Industrial Organization, Northwestern University, 1999–2013
- Research Associate, National Bureau of Economic Research, 1987–present
- Co-organizer, Columbia/Duke/Northwestern (and now MIT) IO Theory Conference, 2002–present
- Program Committee, American Economic Association Annual Meetings, 2001
- Program Committee, Econometric Society World Congress, 2000
- Co-Editor, *RAND Journal of Economics*, 1991–1997
- Program Committee, Econometric Society Meetings, 1989

A.9. Teaching experience

- Graduate industrial organization, antitrust, and regulation
- MBA microeconomics, competitive strategy, and strategic supply relationships
- Graduate microeconomic theory
- Undergraduate industrial organization and antitrust
- Undergraduate applied microeconomics
- Undergraduate intermediate microeconomics

Appendix B. Materials relied upon

In addition to the materials relied upon below, I incorporate by reference all materials cited within the footnotes in my report and the accompanying back up materials.

B.1. Academic

- Bernheim, B. Douglas, and Michael D. Whinston. Microeconomics. 2nd edition. New York: McGraw-Hill, 2014.
- Besanko, David, David Dranove, Mark Shanley, and Scott Schaefer. Economics of Strategy. 7th edition. Hoboken, NJ: John Wiley & Sons, 2016.
- Carlton, Dennis W., and Jeffrey M. Perloff. Modern Industrial Organization. 4th edition. Boston: Pearson/Addison Wesley, 2005.
- Cooper, James C., Luke M. Froeb, Dan O'Brien, and Michael G. Vita. “Vertical Antitrust Policy as a Problem of Inference.” International Journal of Industrial Organization 23, no. 7-8 (September 2005): 639-664.
- Crawford, Gregory S., and Ali Yurukoglu. “The Welfare Effects of Bundling in Multichannel Television Markets.” American Economic Review 102, no. 2 (April 2012): 643-685.
- Crawford, Gregory S., Robin S. Lee, Michael D. Whinston, and Ali Yurukoglu. “The Welfare Effects of Vertical Integration in Multichannel Television Markets.” Econometrica 86, no. 3 (May 2018): 891-954.
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- Hausman, Jerry A., and Gregory K. Leonard. “The Competitive Effects of a New Product Introduction: A Case Study.” Journal of Industrial Economics L, no. 3 (September 2002): 237-263.
- Hausman, Jerry A., Ariel Pakes, and Gregory L. Rosston. “Valuing the Effect of Regulation on New Services in Telecommunications.” Brookings Papers on Economic Activity. Microeconomics 1997 (1997): 1-54.
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- Rogerson, William P. "Modelling and Predicting the Competitive Effects of Vertical Mergers: the Bargaining Leverage Over Rivals Effect." Canadian Journal of Economics 53, no. 2 (May 2020): 407-36.
- Salop, Steven C., and David T. Scheffman. "Raising Rivals' Costs." American Economic Review 73, no. 2 (May 1983): 267-271.
- Shapiro, Carl M. "Vertical Mergers and Input Foreclosure Lessons from the AT&T/Time Warner Case." Review of Industrial Organization 59 (2021): 303-341.

B.2. Publicly available documents

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- ACC. "ACC Network Frequently Asked Questions." September 04, 2019, https://theacc.com/news/2019/3/11/general-acc-network-frequently-asked-questions.aspx.
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- Adgate, Brad. "YouTube TV is Forecasted toto Be The Largest Pay-TV Distributor In 2026." *Forbes*, April 7, 2024, https://www.forbes.com/sites/bradadgate/2024/04/07/youtube-tv-is-forecast-to-be-the-largest-pay-tv-distributor-in-2026.
- Adler, David. "How MLB.TV became the gold standard for sports streaming." *MLB*. May 24, 2023, https://www.mlb.com/news/mlb-tv-growth-as-top-sports-league-streaming-service.
- Altice USA. "Altice USA Introduces Optimum Stream And Suddenlink Stream: A Best-In-Class Streaming Experience For The Company's Broadband Customers." News release, July 19, 2021, https://www.alticeusa.com/news/articles/press-release/news/altice-usa-introduces-optimum-stream-and-suddenlink-stream-best-class-streaming-experience-company%E2%80%99s.
- Aluru, Nikhil et. al. "Remain Underweight on Long-Term Competition." *J.P. Morgan*, March 1, 2024.
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release/prime-video-and-nascar-announce-new-sevenyear-medi?ref_=a20m_us_blg_ces_fvemktrndv.

- Amazon MGM Studios. "Historic Exclusive Thursday Night Football Deal Between Prime Video and the NFL Now Set to Begin a Year Early in 2022." News release, May 3, 2021, https://press.amazonmgmstudios.com/us/en/press-release/historic-exclusive-ithursday-night-footballi.
- Amazon. "Amazon Prime Video Makes History as the First Streaming Service to Secure an Exclusive National Broadcast Package From the NFL, Becoming the Home for Thursday Night Football Beginning in 2023." News release, March 18, 2021, https://press.aboutamazon.com/2021/3/amazon-prime-video-makes-history-as-the-first-streaming-service-to-secure-an-exclusive-national-broadcast-package-from-the-nfl-becoming-the-home-for-thursday-night-football-beginning-in-2023.
- Amazon. "MLB.TV Now Available on Prime Video Channels." News release, March 20, 2019, https://press.aboutamazon.com/2019/3/mlb-tv-now-available-on-prime-video-channels.
- Amazon. "Prime Video Sports." Accessed May 21, 2024, https://press.amazonmgmstudios.com/us/en/sports.
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- Amazon. "Upgrade to Go Ad Free." Accessed June 27, 2024, https://www.amazon.com/gp/help/customer/display.html?nodeId=TD5EYJIUGQMY13QQd.
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B.4. Depositions

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- Deposition of Bob Iger, June 20, 2024.
- Deposition of Justin Warbrooke, June 21, 2024.
- Deposition of Bruce Campbell, June 24, 2024.
- Deposition of John Janedis, June 25, 2024.
- Deposition of Todd Mathers, June 27, 2024.
- Deposition of Eric Shanks, June 27, 2024.
- Deposition of John Nallen, June 27, 2024.
- Deposition of Alberto Horihuela, June 28, 2024.
- Deposition of Paul Cheesbrough, June 28, 2024.

B.5. Discovery

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- FOX-019582.
- FOX-019638.
- FOX-019733.
- FOX-020106.
- FOX-020490.
- FOX-020501.
- FOX-021137.
- FOX-021473.
- FOX-021782.
- FOX-022354.
- FOX-022688.
- FOX-023100.
- FOX-023509.
- FOX-023616.
- FOX-023698.

- FOX-023969.
- FOX-024386.
- FOX-024561.
- FOX-033353.
- FOX-043715.
- FOX-044398.
- FOX-045899.
- FOX-057328.
- FOX-064837.
- FOX-065060.
- FUBO_0002521.
- FUBO_0011001.
- FUBO_0063681.
- FUBO_0097919.
- FUBO_0099661.
- FUBO_0100773.
- FUBO_0101226.
- FUBO_0101468.
- FUBO_0165242.
- FUBO_0165271.
- FUBO_0165281.
- FUBO_0168358.
- FUBO_0168457.
- FUBO_0168459.
- FUBO_0168496.
- NBC-00001500.
- TWDC_FUBO_00021713.
- TWDC_FUBO_00037556.

- TWDC_FUBO_00066919.
- TWDC_FUBO_00077313.
- TWDC_FUBO_00077953.
- TWDC_FUBO_00078035.
- TWDC_FUBO_00079295.
- TWDC_FUBO_00079512.
- TWDC_FUBO_00080003.
- TWDC_FUBO_00080422.
- TWDC_FUBO_00080746.
- TWDC_FUBO_00080864.
- TWDC_FUBO_00081550.
- TWDC_FUBO_00082094.
- TWDC_FUBO_00082294.
- TWDC_FUBO_00082451.
- TWDC_FUBO_00082741.
- TWDC_FUBO_00083289.
- TWDC_FUBO_00083338.
- TWDC_FUBO_00083884.
- TWDC_FUBO_00090891.
- TWDC_FUBO_00090946.
- TWDC_FUBO_00104131.
- TWDC_FUBO_00123202.
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B.6. Other expert reports

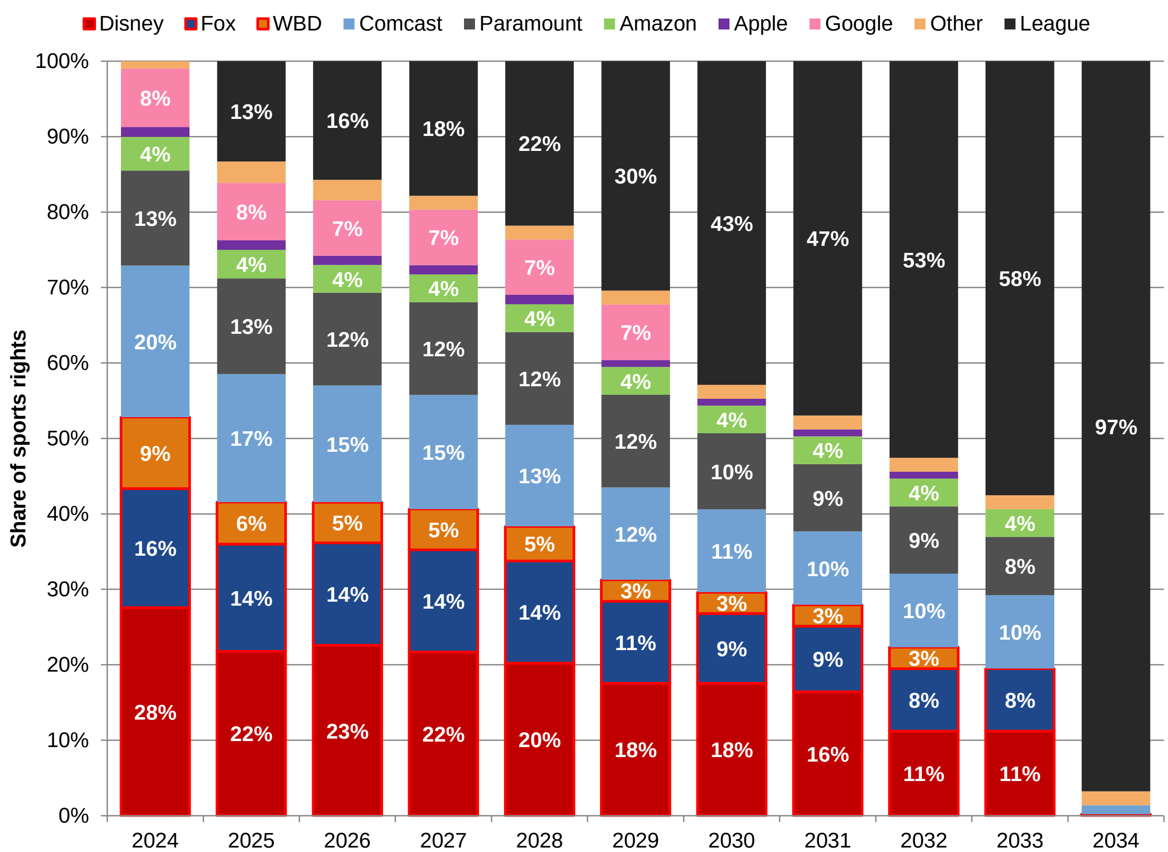
- Declaration of John Janedis, April 8, 2024.
- Expert Declaration of Jonathan Orszag, April 7, 2024.
- Supplemental Expert Declaration of Jonathan Orszag, April 29, 2024.
- Updated Expert Declaration of James Trautman, June 24, 2024.
- Updated Expert Declaration of Jonathan Orszag, June 24, 2024.

B.7. Legal

- United *States v. AT&T Inc.*, 310 F. Supp. 3d, at 161, 195–196 (D.D.C. 2018), *aff'd* 916 F.3d 1029 (D.C. Cir. 2019).

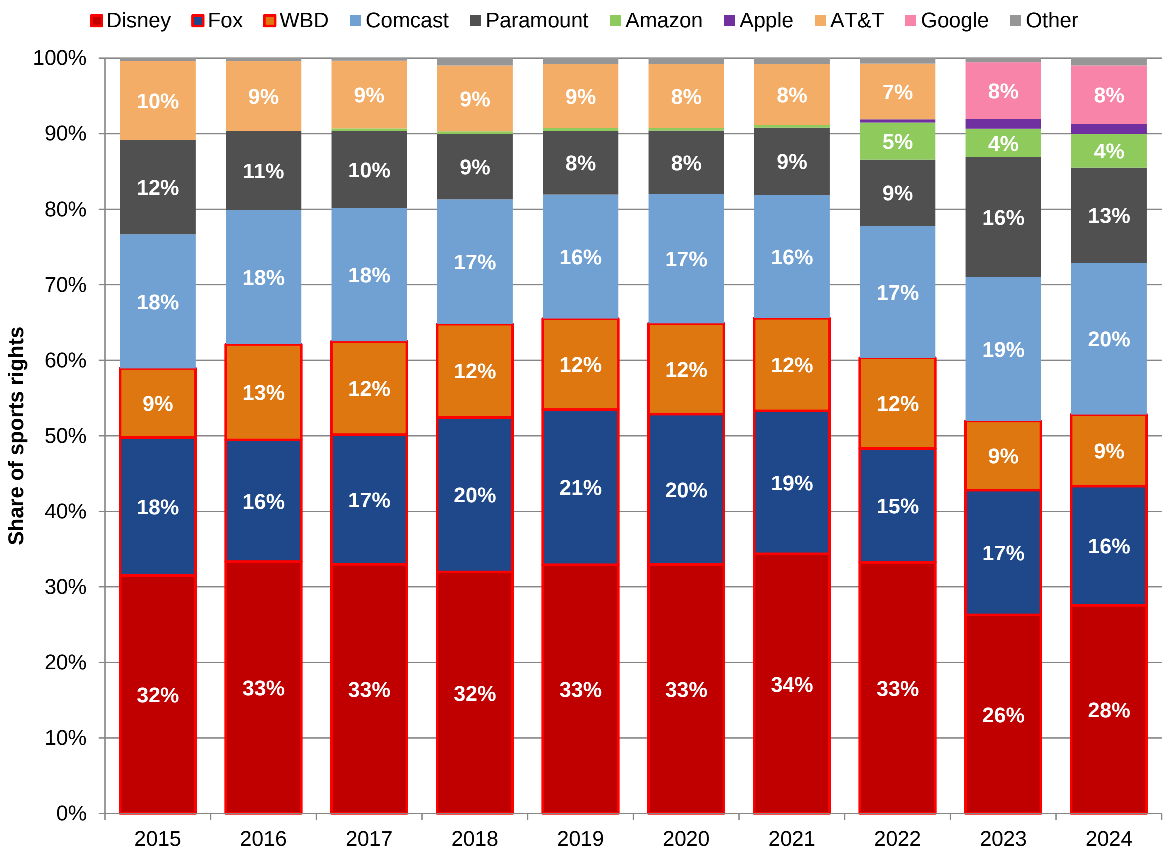
Appendix C. Additional figures

Figure 50. Shares of licensed-out sports telecast rights returning to leagues, excluding RSNs, 2024–2036



Source: Compiled from public sources, see my backup; "Fox Corporation (FOXA.O)," *Citi Research*, February 6, 2024, 2; John-Paul O'Sullivan and Scott Robson, "Global Sports Rights Update, H2 2023: Industry Awaits NBA and EPL Renewals," *S&P Global Market Intelligence*, November 24, 2023.
Notes: JV members are outlined in red. This figure is created by extending each sports telecast rights contract identified between leagues and programmers/new direct buyers through the end of the contract, holding the average annual value constant. When the contract expires, the value of the contract reverts to the league. Rights are aggregated by owner and year to produce shares.

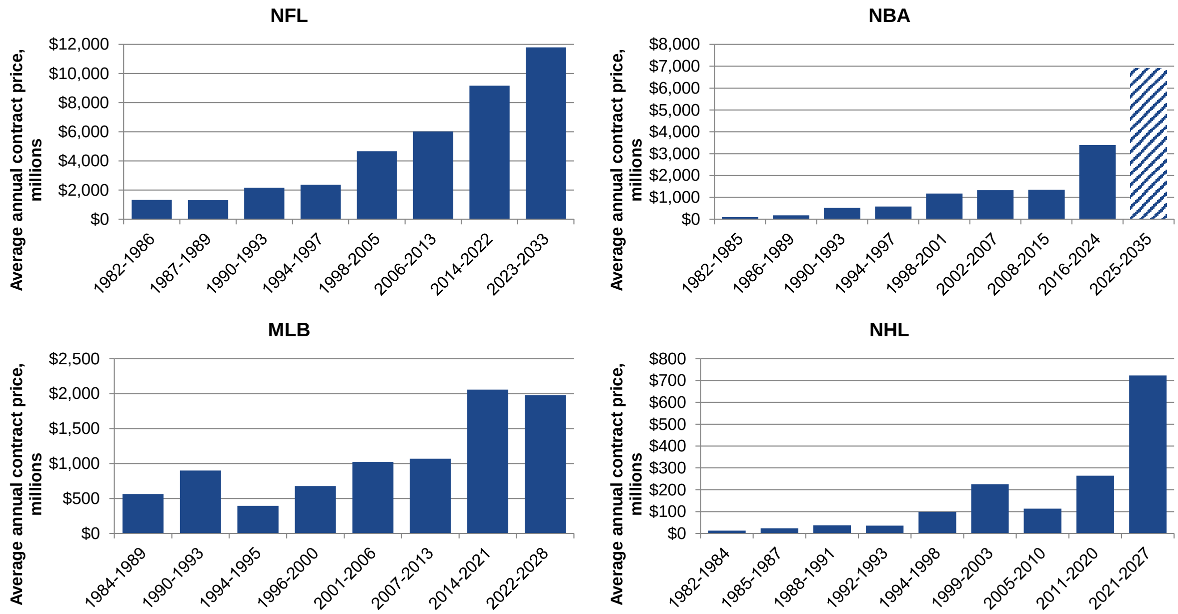
Figure 51. Shares of sports telecast rights by owner, excluding RSNs, 2015–2024



Source: Compiled from public sources, see my backup; "Fox Corporation (FOXA.O)," Citi Research, February 6, 2024, 2; John-Paul O'Sullivan and Scott Robson, "Global Sports Rights Update, H2 2023: Industry Awaits NBA and EPL Renewals," *S&P Global Market Intelligence*, November 24, 2023.

Note: JV members are outlined in red. Ownership of sports rights is attributed to the parent company of the relevant networks as of today. Other than AT&T's ownership of DirecTV's Sunday Ticket rights and the Turner Networks' rights between 2018-2022, no two parent companies' sports rights ownership overlaps. Totals exclude rights held by RSNs. The set of sports included in the analysis is the union of the set of sports named in the Citi Research report cited by Mr. Orszag for his Figure 5 and the set of sports included in S&P Global's historical sports rights dataset. These reports were used to identify relevant sports rights contracts, but values for individual owners were compiled from public sources.

Figure 52. Average annual contract price of NFL, NBA, MLB, and NHL rights, 2024 dollars



Source: Compiled from public sources, see my backup; “Fox Corporation (FOXA.O),” *Citi Research*, February 6, 2024, 2; John-Paul O’Sullivan and Scott Robson, “Global Sports Rights Update, H2 2023: Industry Awaits NBA and EPL Renewals,” *S&P Global Market Intelligence*, November 24, 2023; FRED Economic Data. "Consumer Price Index for All Urban Consumers: All Items in U.S. City Average." June 12, 2024, https://fred.stlouisfed.org/series/CPIAUCSL
Note: Assumes that future contract value is in 2024 dollars. The total value of the newest NBA contract is reported to be about $76 billion over 11 years, or just under $7 billion per year. The data include the value of rights to major programmers and ad-hoc deals with direct buyers, but the contract periods are based on the years of the leagues’ contracts with the major programmers, with the exception of the 2014–2022 NFL period, which combines Disney’s 2014-2021 and 2022 contracts into one. The gap in NHL rights between 2003 and 2005 is due to the lockout during the 2004-2005 season.

Figure 53. Telecasts of the 2023/2024 NBA season are spread across many programmers

Event	ABC	ESPN	NBA TV	TNT	RSN*
NBA Summer League		x	x		
Regular Season	x	x	x	x	x
NBA In-Season Tournament	x				
NBA on Christmas day	x	x			
All-Star Game				x	
Play-in Tournament		x		x	
First Round Playoffs	x	x	x	x	x**
Conference Semifinals	x	x		x	x**
Conference Finals		x		x	
NBA Finals	x				

Source: Compiled from public sources, see my backup.
Notes: A programmer is flagged as carrying a game type if they carry any game. This treats a programmer that carries one game the same as a programmer that carries multiple games. No streaming services have exclusive broadcasting rights to NBA games. ESPN2 and TBS act as overflow channels for ESPN and TNT. National NBA games make up only about 20% of regular season games. For those outside the local market, NBA TV simulcasts one of the local broadcasts of the game they're airing. The current NBA contract for broadcast networks expires at the end of the 2024-2025 season. Only includes English language broadcasts (excludes Telemundo, Universo, ESPN Deportes). * RSNs carry every NBA game featuring your local team that doesn't air nationally. ** Games during the first two rounds of the playoffs may be televised on RSNs.

Figure 54. Telecasts of the 2024 MLB season are spread across many programmers and new direct buyers of sport rights

Event	ESPN	Fox	Fox Sports 1	MLB Network	TBS	RSN*	Apple TV+	Roku
MLB Spring Training	x			x		x		
Regular Season	x	x	x	x	x	x	x	x
All-Star Game		x						
Wild Card Series	x**							
American League Division Series		x	x					
National League Division Series					x			
American League Championship Series		x	x					
National League Championship Series					x			
World Series		x						

Source: Compiled from public sources, see my backup.
Notes: A programmer is flagged as carrying a game type if they carry any game. This treats a programmer that carries one game the same as a programmer that carries multiple games. For those outside the local market, MLB Network simulcasts one of the local broadcasts of the game they're airing. Only includes English language broadcasts. Wild Card, Division Series, and Championship Series games are based on the 2023 season schedule. * RSNs carry games that are not exclusively airing on national channels, Apple TV+, or Roku. Every team has a dedicated RSN that broadcasts to a specific territory defined by the MLB. Amazon Prime Video also carries select local Yankees telecasts like an RSN. MLB.TV only includes out-of-market non-national broadcasted games. ** ABC, ESPN and ESPN2 will combine to broadcast all four, best-of-three series.

Figure 55. Telecasts of the 2023/2024 NHL season are spread across many programmers and new direct buyers of sports rights

Event	ABC	ESPN	TNT	NHL Network	RSN	ESPN+ / Hulu**
Regular Season	x	x	x	x	x	x
Playoffs	x	x	x			
All-star game		x				
First Round Playoffs		x	x			
Second Round Playoffs		x	x			
Eastern Conference Finals	x	x				
Western Conference Finals			x			
Stanley Cup Final	x*					

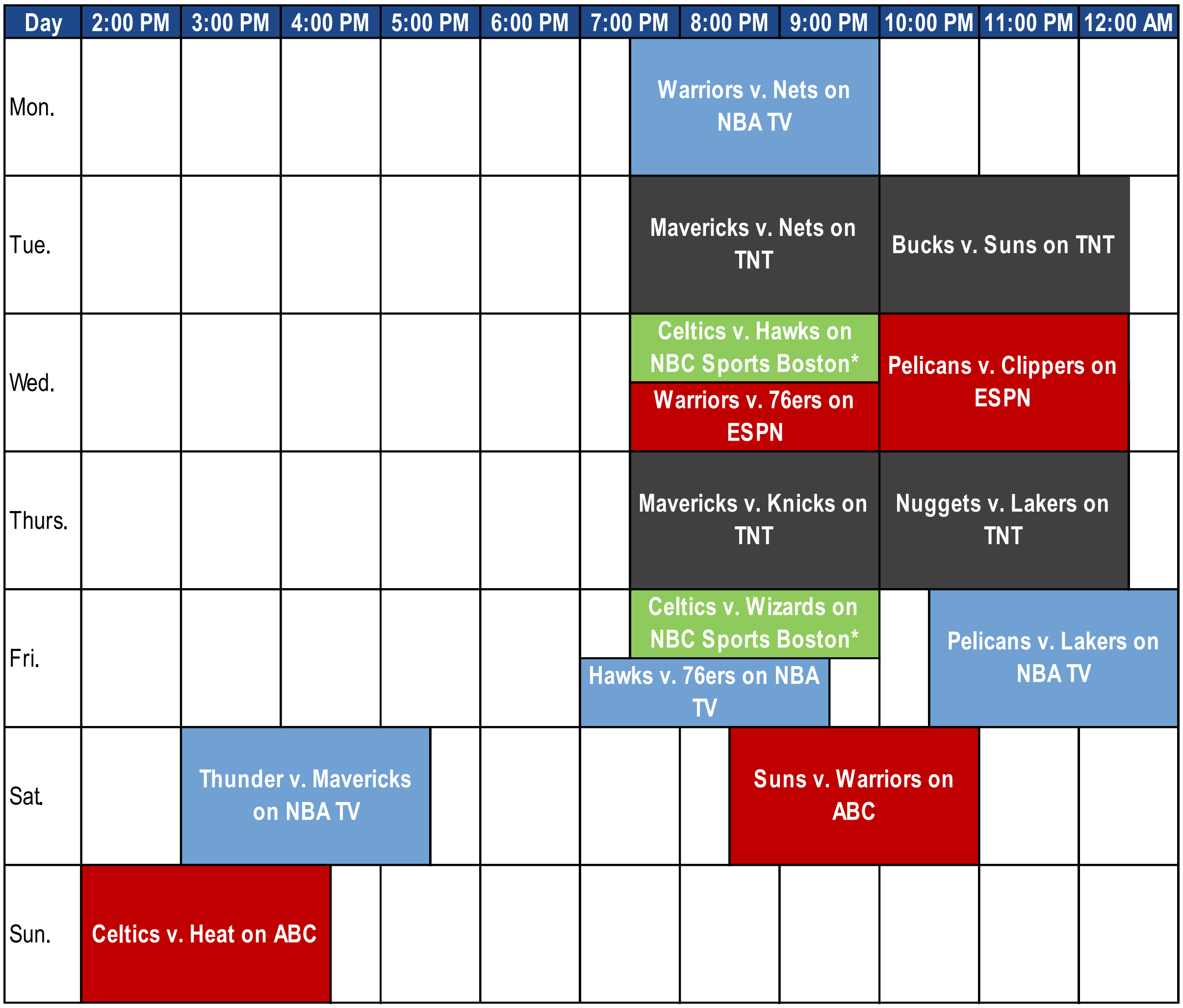
Source: Compiled from public sources, see my backup.
Notes: A broadcaster is flagged as carrying a game type if they carry any game. This treats a network/service that carries one game the same as a network/service that carries multiple games. NHL Network will broadcast certain regional games throughout the season outside of the Local Markets. These games will not be available in ESPN+ or on NHL Center Ice. ABC games are also available in ESPN+. ESPN2 and TBS occasionally act as overflow channels for ESPN, TNT, TBS, and TruTV. Two out-of-market options exist for NHL fans: ESPN+ and NHL Center Ice. Both allow you to watch over 1,000 out-of-market games, which don't air on local or national TV. Only includes English language broadcasts. * TNT hosts Stanley cup finals in odd-numbered years. ABC hosts in even-numbered years. ** ESPN+ and Hulu share 50 exclusive national matchups.

Figure 56. Telecasts of the 2024 MLS season are spread across one programmer and one new direct buyer of sports rights

Event	Fox	Fox Sports 1	Apple TV+	MLS Season Pass (Apple TV+)
Regular Season	x	x	x	x
All-star game				x
Leagues Cup		x		x
Leagues Cup Final				x
MLS Playoffs	x	x		x
MLS Cup Final	x			x

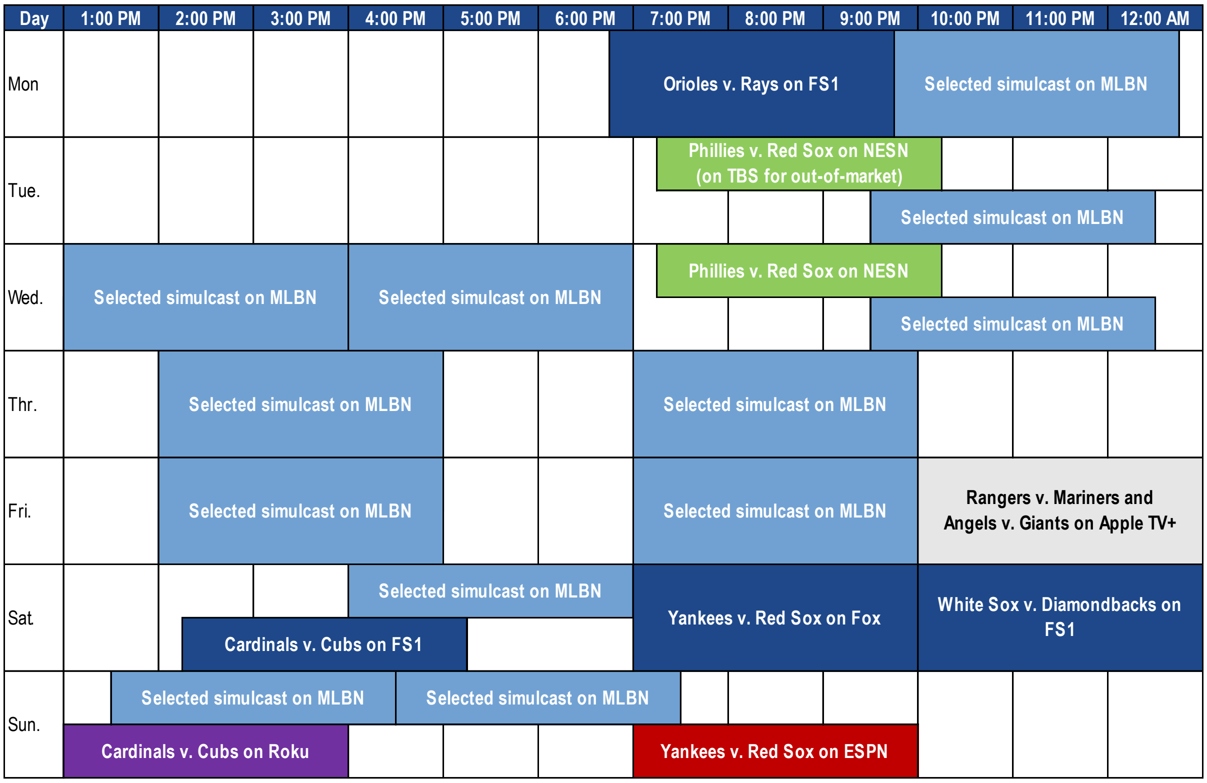
Source: Taylor Kujawa. "How to Watch Major League Soccer 2024." Cable TV. Updated June 17, 2024. https://www.cabletv.com/sports/watch-mls; Kyle Bonn. "MLS Free Games on Apple TV this Weekend: Which Matches are Broadcast Free on MLS Season Pass." *Sporting News*, June 3, 2024. https://www.sportingnews.com/us/soccer/news/mls-free-stream-apple-tv-season-pass-today-live/5897cab2e41c7e2c5b250024.
Notes: A broadcaster is flagged as carrying a game type if they carry any game. This treats a network/service that carries one game the same as a network/service that carries multiple games. Apple TV+ hold almost exclusive rights to the MLS. Apple owns the rights to MLS Season Pass. You do not need Apple TV+ to buy MLS Season Pass. Fox carries 15 regular season games, and FS1 carries 19. All Fox and FS1 games are also broadcast via Fox Deportes in Spanish. Apple TV+ includes up to six MLS games each week without the need to sign up for an MLS Season Pass or for Apple TV+, if you have an Apple ID, which you can set up for free. MLS Season Pass carries all 493 games.

Figure 57. The NBA spaces games across different days and times, week of February 5, 2024



Source: Compiled from public sources, see my backup.
Note: From the perspective of a fan living in the Boston Market. When the Celtics are not televised nationally, their games are aired on NBC Sports Boston, a Boston-area RSN (colored in green). The Celtics played one nationally broadcast game this week on Sunday, February 11th, which aired on ABC. NBA broadcast time of approximately 150 minutes is inferred from broadcast schedule.

Figure 58. The MLB spaces games across different days and times, week of June 10, 2024



Source: "Baseball Schedule June 9 – June 11, 2024," MLB, accessed June 10, 2024, https://web.archive.org/web/20240610014527/https://www.mlb.com/schedule; "Baseball Schedule June 12 – June 14, 2024," MLB, accessed June 10, 2024, https://web.archive.org/web/20240610014541/https://www.mlb.com/schedule/2024-06-12; Baseball schedule June 15 – June 17, 2024, MLB, accessed June 10, 2024, https://web.archive.org/web/20240610014555/https://www.mlb.com/schedule/2024-06-15; "TV Schedule," MLB Network, accessed June 10, 2024, https://www.mlb.com/network/tv-schedule.
Note: From the perspective of a viewer in the Boston Market. When the Red Sox are not exclusively televised nationally, their games air on NESN, a Boston-area RSN (colored in green). Sometimes, even when the game is telecast nationally, it is only available within the Boston market via NESN (i.e., Tuesday). MLBN is MLB Network. MLB Network will distribute one game at a time based on a viewer's location. MLB Network rebroadcasts the local feed of the game. Fox distributes multiple MLB games on Saturdays simultaneously. Based on a viewer's location, Fox selects which telecast to provide on their channel. The other Fox game airing at 7 PM is Rangers v. Mariners. Apple TV+ users have access to both games on Friday nights, regardless of location. Start times rounded to down to the nearest 15-minute interval. Games are assumed to be broadcast for three hours based on allocated broadcast times provided by the network schedules.

Figure 59. Share of SVOD subscribers who subscribe to other SVODs, 2023

SVOD	Total Respondents	Netflix	Amazon Prime Video	Hulu	Disney+	Paramount+	Max	Peacock Premium	Apple TV+	ESPN+	YouTube Premium
Netflix	55%	100%	69%	77%	78%	73%	79%	71%	77%	73%	69%
Amazon Prime Video	53%	67%	100%	69%	71%	75%	73%	73%	77%	70%	66%
Hulu	40%	56%	52%	100%	72%	66%	66%	65%	67%	74%	58%
Disney+	34%	48%	45%	60%	100%	62%	60%	57%	62%	73%	49%
Paramount+	24%	31%	34%	39%	43%	100%	42%	52%	47%	43%	32%
Max	21%	31%	30%	35%	38%	38%	100%	35%	45%	37%	28%
Peacock Premium	19%	24%	26%	30%	31%	41%	31%	100%	38%	35%	32%
Apple TV+	12%	16%	17%	20%	22%	24%	25%	24%	100%	28%	25%
ESPN+	11%	14%	14%	20%	23%	19%	18%	20%	25%	100%	17%
YouTube Premium	9%	12%	12%	14%	14%	13%	13%	16%	20%	15%	100%

Source: S&P Global Market Intelligence, “Kagan Consumer Insights: United States, 2023.”
Notes: Answers to “Which of the following online video subscription services do you or someone in your household currently use? Please select all that apply” among a sample of 2,500. Limited to the top 10 most popular SVODs. The first column, “Total Respondents,” indicates the share of survey respondents that subscribe to each SVOD reading down. For example, 53% of respondents subscribe to Amazon Prime Video. Reading across, 67% of Netflix subscribers also subscribe to Amazon Prime Video.

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